Supreme Court, U.S.
FILED
JAN 11 2001
CLERK

No. 00-6677

In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 257

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January 11, 2001

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SUPREME COURT, U.S.

Petition For Certiorari Filed October 20, 2000
Certiorari Granted November 27, 2000

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TABLE OF CONTENTS

Page

VOLUME I

Docket Sheets

1. District Court of Polk County, Cause No. 10,222 1

2. District Court of Walker County, Cause No. 15,977 1

3. Texas Court of Criminal Appeals, Nos. 71,130 & 15,981-02 2

4. United States District Court for the Southern District of Texas, Civil Action No. H-97-4094 2

5. United States Court of Appeals for the Fifth Circuit, No. 99-20868 3

Trial Record

6. Jury Instructions (competence trial), Tr. I:196-200 4

7. *Voir dire* (excerpt), Tr. 15:186-87 9

8. SX 47 11

9. SX 48 16

10. Jury Instructions (guilt or innocence phase), Tr. IV:997-1004 26

11. DX 4 36

12. DX 5 38

13. DX 6 40

14. DX 7 42

15. SX 99 50

TABLE OF CONTENTS – Continued

Page

16. SX 101A 55

17. SX 102 61

18. Testimony of Michael Grant (excerpt), Tr. 47:962-68 81

19. Testimony of Wallace Selman (excerpt), Tr. 47:978-83 89

20. Testimony of Frank Bragg (excerpt), Tr. 47:993-95 95

21. Testimony of Tim Keith (excerpt), Tr. 47:1003-08 99

22. Testimony of Clayton Malone, Tr. 47:1048-81 ... 105

23. Testimony of Sanders Estes (excerpt), Tr. 47:1156-57 136

24. Testimony of Belinda Anderson, Tr. 48:1079-1110 139

25. Testimony of Trudy Ross, Tr. 48:1111-51 171

26. Testimony of Jesse Penry, Tr. 48:1152-61 209

27. Testimony of Lucille Anderson, Tr. 48:1162-69 ... 220

28. Testimony of Billie Johnson (excerpt), Tr. 48:1245-52 228

29. Testimony of Caroline Ward, Tr. 48:1278-1300 ... 236

VOLUME II

30. Testimony of Randall Price, Tr. 48:1304-83, 49:1403-1551 258

31. Testimony of Walter Quijano, Tr. 50:1610-1702 ... 449

TABLE OF CONTENTS – Continued

Page

VOLUME III

32. Testimony of Stanton Samenow, Tr. 50:1704-78 531

33. State's Opening Argument (penalty phase), Tr. 51:1828-63 595

34. Defendant's Closing Argument (penalty phase), Tr. 51:1865-1921 618

35. State's Closing Argument (penalty phase), Tr. 51:1922-47 653

36. Requested Jury Instruction No. 30, Tr. IV:1127-29 669

37. Jury Instructions (Penalty Phase), Tr. V:1326-32 672

Previous Orders and Opinions

38. Texas Court of Criminal Appeals, decision of Feb. 22, 1995 (reported at 903 S.W.2d 715) 679

VOLUME IV

39. District Court of Polk County, decision of Sept. 23, 1997 795

40. Texas Court of Criminal Appeals, order dated Dec. 3, 1997 863

41. United States District Court for the Southern District of Texas, decision of March 29, 1999 ... 865

42. United States District Court for the Southern District of Texas, decision of Aug. 12, 1999 ... 1018

TABLE OF CONTENTS – Continued

Page

43. United States Court of Appeals for the Fifth Circuit, opinion filed June 20, 2000 (reported at 215 F.3d 504) 1037

44. United States Court of Appeals for the Fifth Circuit, order filed July 25, 2000 1061

45. Supreme Court of the United States, order dated Nov. 27, 2000 1063

RELEVANT DOCKET ENTRIES

(abbreviations expanded)

District Court of Polk County, Cause No. 10,222

* * *

March 27, 1990	. . . . Defendant's motion for change of venue granted; case to be transferred to Walker County. State's motion granted . . . to appoint Dr. Fasson or Dr. Quijano to examine defendant.

* * *

District Court of Walker County, Cause No. 15,977-C

* * *

July 9, 1990	. . . . Jury returned verdict; verdict guilty of capital murder. . . .

* * *

July 16, 1990	. . . . Defendant's instructions and objections heard and ruled upon . . . .
July 17, 1990	. . . . Charge read to jury. . . . Jury returned verdict. . . . Verdict of "yes" for all 3 special issues received and filed. . . . Judgment entered on verdict. Defendant remanded to custody of Sheriff of Walker County to be transported to T.D.C. pending automatic appeal of death sentence.
September 21, 1990	Defendant's motion for new trial heard and denied. . . .

May 5, 1997	Order to transfer case back to Polk County signed.

Texas Court of Criminal Appeals, Nos. 71,130 & 15,981-02

* * *

February 22, 1995	Opinion issued affirm[ing decision below].

* * *

June 7, 1995	Rehearing denied.

* * *

United States District Court for the Southern District of Texas, Civil Action No. H-97-4094

* * *

March 29, 1999	Memorandum and order granting Respondent's motion for summary judgment; denying Penry's motion to strike; denying Penry's cross-motion for summary judgment, entered.
March 29, 1999	Final judgment entered . . . . Court denies petitioner Johnny Penry's petition and denies a certificate of appealability.

* * *

August 12, 1999	Memorandum and opinion denying Penry's motion to alter and amend judgments entered.

* * *

United States Court of Appeals for the Fifth Circuit, No. 99-20868

* * *

June 20, 2000	Order filed denying motion for Certificate of Appealability.

* * *

July 25, 2000	Order filed denying petition for rehearing *en banc*, denying petition for rehearing.

* * *

CAUSE NO. 15,977-C

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF WALKER COUNTY, TEXAS
VS.	§	
JOHNNY PAUL PENRY	§	278TH DISTRICT COURT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant, JOHNNY PAUL PENRY, stands charged by indictment with a felony offense, alleged to have been committed in Polk County, Texas on or about the 25th day of October, 1979. You have been impaneled to determine the issue of the present competency of the defendant to stand trial for such offense.

1.

Our law provides that no person shall be tried for a criminal offense while he is incompetent to stand trial. A person is incompetent to stand trial for an offense if he does not have:

(a) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or

(b) a rational as well as factual understanding of the proceeding against him.

2.

The defendant shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.

By the term "preponderance of the evidence" is meant the greater weight and degree of the credible evidence in the case.

The fact that the defendant is under indictment is no evidence of present competency to stand trial, and you should not consider such fact as evidence. Neither should you, in your deliberations, consider or discuss the guilt or innocence of the defendant with respect to the offense charged against him.

You will confine your consideration and deliberations solely to the issues submitted to you.

3.

On the issue of present incompetency of the defendant you are instructed that the law requires the jury to find and state in its verdict whether the defendant is incompetent to stand trial; and, if the jury finds the defendant incompetent at the present time, then the jury shall find and state in its verdict whether there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future.

4.

If you find by a preponderance of the evidence that the defendant does not have sufficient present ability to

consult with his lawyer with a reasonable degree of rational understanding, or does not have a rational as well as factual understanding of the proceeding against him, then you will find him incompetent to stand trial; otherwise, you will find in accordance with the instructions given you.

5.

You are the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony, but the law you shall receive in these written instructions and be governed thereby.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you, nor any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you retire to the jury room you should select one of your members as your Foreperson. It is the Foreperson's duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form which you will find attached hereto, and signing the same as Foreperson.

Bearing in mind the foregoing instructions, you will answer the special issues on the pages following, placing your answer in the spaces provided therefor.

FILED: _____

/s/ Joe Ned Dean
JUDGE PRESIDING

SPECIAL ISSUE NO. 1

Do you find by a preponderance of the evidence that the defendant, JOHNNY PAUL PENRY, is presently incompetent to stand trial for the offense charge against him?

If you find by a preponderance of the evidence that the defendant does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or that he does not have a rational as well as factual understanding of the proceeding against him, then you will find him presently incompetent to stand trial and your answer to Special Issue No. 1 will be "Yes;" otherwise, you will answer "No."

ANSWER: /s/ NO

If you have answered Special Issue No. 1 "Yes," then answer the following special issue:

SPECIAL ISSUE NO. 2

Do you find that there is no substantial probability that the defendant will attain the competency to stand

trial within the foreseeable future, you will answer the question by having the Foreperson sign his/her name as Foreperson to the first answer below. If you do not so find, you will answer the question by having the Foreperson sign his/her name as Foreperson to the second answer below:

ANSWER:

(a) We, the jury, find that there is no substantial probability that the defendant, JOHNNY PAUL PENRY, will attain the competency to stand trial within the foreseeable future.

_____
FOREPERSON

(b) We, the jury, do not find that there is no substantial probability that the defendant, JOHNNY PAUL PENRY, will attain the competency to stand trial within the foreseeable future.

_____
FOREPERSON

VERDICT

We, the jury, return in court the above answers as our answers to the special issues submitted to us, and the same is our verdict in this case.

/s/ Richard I Watkins 5/16/90
FOREPERSON

CAUSE NO. 15,977-C

IN THE DISTRICT COURT
OF WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[15:186] talk to you about more in individual voir dire, concerning your feelings about the death penalty in general, and specifically in rape/murder cases.

Another area, in fact, that a jury can take into consideration is what we refer to loosely sometimes as mitigating evidence. There is not a separate question on mitigating evidence, but you will probably receive some sort of an instruction from the Judge, concerning mitigating evidence. Mitigating evidence, like a lot of other things, is not going to be defined to you specifically. That will be up to you to determine what you may consider mitigating or not. Maybe, basically a mitigating evidence is some sort of evidence concerning the defendant's background or past history that a juror will feel is of such a nature to lessen his blame worthiness for the particular crime he has committed, to make him less morally cupable. It may not have anything directly to do with that crime, something out of his past, but for whatever reason the juror feels, and you have got a [187] right to do this if you so elect, and with regard to any type of a mitigating evidence, if you feel like whatever that evidence is, that it warrants reducing his cupability, his responsibility, his moral responsibility for the commission of this crime, then you can take that into consideration; and furthermore, if you feel like that evidence is strong enough that

you feel like it would even warrant a lesser sentence than death, that it would warrant a life sentence instead of death, then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

A couple of things about mitigating evidence. You are going to hear a lot about that, I'm sure, in individual voir dire, for one thing, what is or is not mitigating evidence is up to you. It is not what I say it is, it is not what John Wright says it is, or Randy Smith says it is, it is up to you. Nobody is going to tell you this is mitigating evidence or this is not mitigating evidence.

* * *

[SX #47 /s/ LS 7-3-90]

(CONFESSION WARNING)

Date 10-25-79
Time 3:25 PM

Statement of Johnny Paul Penry, taken at (Building) Livingston Police Department, Polk County, Texas.

On the 25th day of October, 1979, at 2:45 o'clock P.M., I, Johnny Paul Penry, was taken before G.H. Galloway, a Magistrate at the Livingston Police Department Polk County, Texas, who informed me:

Of the accusations made against me;
That I had a right to retain counsel; [/s/ JP]
That I had a right to remain silent;
That I had a right to have an attorney present during my interview with peace officers or attorneys representing the state;
That I have a right to terminate an interview at any time;
That I have a right to request appointment of counsel if I cannot afford counsel;
That I have a right to an examining trial;
That I am not required to make any statement, and any statement I make may be used against me.

I have now been warned by W.F. Smith –
the person to whom I am making this statement, and was so warned by
W. F. Smith prior to any questioning of me by Peace Officers while I was under arrest: (1) that I have the right to have a lawyer present to advise me either prior to any questioning or during my questioning; (2) that if I am unable to employ a lawyer I have the right to have a

lawyer appointed to counsel with me prior to or during any questioning, and (3) I have the right to remain silent and not make any statement at all and that any statement I make may and probably will be used in evidence against me at my trial; and (4) I have the right to terminate the interview at any time. and (5) that any statement I make may be used as evidence against me in court.

I do not want to consult with a lawyer before I make this statement, and I do not want to remain silent, and I now freely and voluntarily waive my right to a lawyer and to remain silent and make the following voluntary statement:

My name is Johnny Paul Penry and I am 23 years of age; [/s/ J.P.] I was born in Lawton, Oklahoma and at present I consider the [/s/ J.P.] following address my home 302 Orr Dr. Livingston, Texas [/s/ J.P.]

About 3 weeks ago a guy named Harold came out to my Aunt Evelyn's and wanted me to help him move some heavy stuff. I left with him and we went to a house out of Livingston and turned on the electricity. We came back to Livingston to his business and loaded a stove and freezer up on a pickup. We carried it to a house behind where they work and the school buses. This is the house where I saw this chick that I stabbed today. It was her house. Another older woman was with her. I think it was her neighbor. We unloaded the stuff and had to go to Reuters and get a pipe for the stove. We went back and fixed the stove. The chick that I stabbed said the freezer didn't work so me and Harold went back to the shop and got a part and then fixed the freezer. After we fixed the freezer we went to another house right behind there in the back

yard and worked on another stove. We boogied back to town and about an hour later we went back to this chicks house to get Harold's money for the stove and freezer. No one was home so we went on back and did some more work. My Aunt came and got me for a Doctor's appointment. While we were at the Chick's house nothing out of the ordinary happened. I didn't see her again until today. [/s/ J.P.]

WITNESS: /s/ [Illegible]
/s/ [Illegible]
/s/ Johnny P. Penry

[/s/ J.P.]

[/s/ J.P.] I got up this morning and was messing around town. I saw this other girl and she looked pretty good. This made me think about this Chick I stabbed. I decided I would try to go over and get me a piece. I'm not sure, but I'd say it was about 8 o'clock or a little after. So I went over to her house and circled around the block to see if her husband was there. I took my pocket knife out and opened it and stuck it back in my pocket. I saw a pickup so I went up to the kitchen door and knocked to see if he was there. She came to the door and opened the wooden door and pushed the screen open a little ways. I asked her if her husband was there and she said no. Then I asked her if I could see her stove and she said, "What for?" I said I was going to fix the stove and she said, "What for, it's working?" She told me, "You better get out of here." That's when I jerked the screen door open, pulled my knife out and grabbed her. I pushed her back in the kitchen. She was screaming and hollering for help,

and knocked the knife out of my hand. We fought in the kitchen a little bit. I slapped her in the face about once. I gōt her down on the floor and she said she was dizzy. I let her up but I held onto her. I looked out the door to see if anybody was coming. I kind of turned by back but I still had a hold of her. She picked up some scissors that had some orange handles. They were pretty big and looked like cutting scissors.

She stabbed me in the back. I wrestled with her and took the scissors away from her. Then I started dragging her into the bedroom and she told her dog to bite me. He started trying to bite me and I kicked him in the throat and he landed under the bed. I don't know what happened to the dog after that. She was laying on her back in the floor and I was standing up. She said she wouldn't take her clothes off. I kicked her in the left side with my boots. She said just wait she'd take her clothes off. She sat up and pulled her pants down past her knees. I unzipped my pants and started to get on her. She got away from me and got up. The scissors were on the bedroom floor. I had dropped them there. She started for them and I kicked them out of her hand. I pushed her down to the floor and started to get on her again. I told her I'd kill her if she didn't make love to me. I hit her about 2 times in the chest and she said "O.K." she would. I went on and fucked her on the bedroom floor and then after I got through I got up and walked over to the kitchen door where the scissors had landed and picked them up. I walked back to her and got down on her. I sat down on her stomach and I told her that I loved her and hated to kill her but I had to so she wouldn't squeal on me. She didn't say anything and I stabbed her with the scissors.

She leaned forward and pulled the scissors out of [/s/ J.P.] herself as I was getting up. I then ran out the door and boogied.

I went home and took my shirt and sweat shirt off and threw them out where the washing machine is. I put another shirt on and went next door to see if I could get some bandaids. Sharon doctored my back and I went home. A good while later a cop I know as Billy came by and said a girl had been raped and stabbed. He asked me if I knew anything about it and I said "No" He asked me about the cuts on my back and I told him I fell on a stick. Billy asked me if I would mind going with him and I said O.K. A little later I told some Officers that they could search my house. I showed them my shirt and sweat shirt.

We then went to the Chick's house that I stabbed. I stayed outside in the car. After a while I started worrying about it and I told him I was going to be honest with him and tell the truth. A deputy there read me my rights and I told them what happened. A little later I went before Judge Galloway and he read my rights to me and my father and mother came up about that time. My father read me my rights again from the paper. He asked me if I did it and I said I did and he and my mother left. I then told Chief Smith and the D. A. that I would give them a written statement about everything I did.

I cannot read or write but this statement was read to me before I signed it. [/s/ JP]

This statement was read to me by Joe Price. [/s/ JP]

I have read this statement consisting of 2 page (s), each of which bears my signature, and I affirm that all the facts and statements contained herein are true and correct. I further affirm that I knowingly, intelligently and voluntarily waived the above rights prior to and during the making of this statement. [/s/ J-P]

Witness my hand this the 25th day of October, A.D. 1979, at 6:05 p.m.

WITNESS: /s/ [Illegible]

WITNESS: /s/ [Illegible]

/s/ Johnny P. Penry
Signature of person making statement

[SX #48 /s/ LS 7-2-90]

(CONFESSION WARNING)

Date 10-26-79
Time 10:40 AM [/s/ J-P]

[/s/ J-P] Statement of Johnny Paul Penry, taken at Livingston Police Department, Livingston, Polk County, Texas.

[/s/ J-P] On the 25th day of October, 1979, at 2:45 o'clock PM, I, Johnny Paul Penry was taken before Judge G. H. Galloway, at the Livingston Police Department, a magistrate in Polk County, Texas, who informed me: (1) Of the accusations made against me and of the sworn complaint filed therewith; (2) That I had a right to retain

counsel; (3) That I had a right to remain silent; (4) That I had a right to have an attorney present during my interview with peace officers or attorneys representing the state; (5) That I have a right to terminate an interview at any time; (6) That I have a right to request appointment of counsel if I cannot afford counsel; (7) That I have a right to an examing trial; (8) That I am not required to make any statement, and any statement I make may be used against me. [/s/ J-P]

[/s/ J-P] I have now been warned by Maurice C. Cook, the person to whom I am making this statement, and was so warned by Maurice C. Cook prior to any questioning of me by peace Officers while I was under arrest; (1) I have the right to remain silent and not make any statement at all and that any statement I make may be used against me at my trial; (2) Any statement I make may be used as evidence against me in court; (3) I have the right to have a lawyer present to advise me prior to an during any questioning; (4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning; and (5) I have the right to terminate the interview at any time. [/s/ J-P]

[/s/ JP] I have read the above rights and have had the same explained to me and do knowingly, intelligently and voluntarily waive the rights as set out above. I do hereby freely and voluntarily [/s/ J-P] without being induced by any compulsion, threats, promises or persuasion, make the following statement. Further, I do not want to consult with a lawyer before I make this statement, and I do not want to remain silent, and I now freely and voluntarily waive my right to a lawyer and to remain

silent and make the following voluntary [/s/ JP] statement: I, Johnny Paul Penry, am 23 years of age and call Livingston, Texas my home. I have decided to tell the police about me killing a chick I raped and stabbed in Livingston, Texas, and about some other people I have raped and tried to rape. [/s/ J-P]

[/s/ J-P] It was about 3 years ago when I first tried to rape someone. this Chick (anytime I say chick I mean girl) lived in a house in Goodrich, Texas, and I later heard that she worked in a dress shop in Livingston, Texas. I went to the back door and kicked it in. I had a knife but I don't know if I pulled it out on her or not. I remember that I got the chick's clothes off and gōt in bed with her. There was a little girl there about 8 years old that kept asking me not to hurt her mother. I told the little girl to get out of there or I would hurt her. I heard a car door slam about the time she (the one I was trying to rape) screamed so I put my pants back on and ran out the back door. I found out that the door slamming was my friends, Pete Jones and Mike, who I don't know his last name, who were waiting outside for me. My friends thought I was going inside the house to collect some money. I did get some money from the house. I took about $40.00 from the chick's purse. I went to the house to get a piece and [/s/ J-P]

/s/ John P. Penry
Page 1 of 4 pages

some money. I had [/s/ JP] only seen the chick once before and that was in Brookshire's store.

[/s/ J-P] The next time I tried to rape someone was just a few months later. I went to a trailer house in Goodrich,

Texas, and turned the lights off to the trailer which was located on a pole near by. When a chick came out to see about the lights I forced her back into the trailer with a switch blade knife. I told her that I would hurt her if she didn't cooperate with me. This was at night. I stayed there for a pretty long time. I made the chick give me a blow job and I also screwed her. At first she fought me but then asked me what I wanted. I told her I wanted her pussy. I first screwed her and then I got the blow job. I came both times. I threatened to kill her if she told anybody and she promised she wouldn't. A few weeks later I found out the chick told the police. I went back to her trailer and got her to open the door by disguising my voice. I was wearing a stocking over my face just as I did the first time. I got her outside and beat her up pretty good. I had my switch blade knife in my pocket. I went to the trailer to kill the chick for telling on me and I was also going to rape her again. Before I could kill her she broke loose and climbed up a TV antenna pole and got on top of the trailer. I went up after her. She went to the far end of the trailer and told me she would jump if I touched her. I grabbed her, and shook her and told her to start doing what I said. I talked to her for a minute and I got careless and shook her and she fell off the end of the trailer. I jumped off the trailer. The chick said she couldn't walk. I got scared and left. [/s/ J-P]

[/s/ J-P] About 2 months after the trailer thing I raped Diana Baker down in Signo, Texas. I was at the Courthouse setting on a bench when Diana drove up. I knew her and her husband so I went over and lied to her about my brother being in a car wreck and got her to run me to Signo. I had 2 knives on me. I used a switch [/s/ J-P]

blade this time. I took over driving and drove Diana's car through a locked gate. I told her if she cooperated with me I wouldn't hurt her. I was good to her, I didn't hurt her. We had sex in the back seat of the car. She wouldn't take her clothes off until I started to cut them off. I just screwed her twice. I got stuck and then turned myself over to 2 guys who came by. Before this we tried to get the car unstuck and talked some. I could tell she was scared and was going to tell the police so I beat her to it and told the police myself. [/s/ J-P]

[/s/ J-P] During the last two months I started looking for some more stuff. (meaning someone to have sex with). I've been getting to know Fredia, a chick in Goodrich who is about 16 or 17, and Jackie, she works at Lee's the truck stop. Jackie is the one I had thought about raping. About a week ago, on Sunday morning, I went to Jackie's house, which is about 100 yards from where I live at in Livingston, Texas. I thought Jackie would be home so I knocked on the door but noone came to the door. I thought she was hiding inside so I went to a side window and cut the screen with my pocket knife. I knew Jackie had a boy about 9 years old named Patrick who I didn't know would be home or not. I was just looking for Jackie. I didn't take anything. I left out the window I came in. [/s/ J-P]

[/s/ J-P] It was about 3 weeks ago, and before I broke into Jackie's house, a guy name Harold came out to my Aunt Evelyn's house and wanted me to help him move some heavy equipment, like ice boxes and stoves. During the day Harold and I loaded up a freezer and stove and carried it to a house located behind the Livingston Junior High School where they work on buses (I later rode over

to the house I'm talking about with a cop named Billy). We put the freezer outside and the stove inside the kitchen. There was a young goodlooking chick (the same one I stabbed later on) there and an older woman. We had to go get some parts and we had to repair the freezer and we were there about 2 hours. We left but came back later to get Harold's money. The Chick (anytime [hereafter J-P]

/s/ Johnny P. Penry
Page 2 of 4 pages

[/s/ J-P] I say Chick I'm talking about the girl I stabbed and raped) was not there when we got back so we did some more work on the equipment until my aunt came to pick me up for a doctor's appointment. The Chick had not come back to pay Harold when I left. When we were there the first time the Chick filled out something from her purse and I noticed that she had some money in there. I remember that I had seen the Chick down town before and liked her looks. They only time I talked to her was at her house when Harold and I delivered the equipment. [/s/ J-P]

[/s/ J-P] During the last 3 weeks I thought about the Chick alot. Then on the morning of October 25, 1979, which was yesterday, I got up and went to town somewhere around 8 or 9 AM. I saw a girl in City Hall who reminded me of the Chick. I decided I would go over to the Chick's house and get me a piece. I also wanted to get the money that she had in her purse. I knew that if I went over to the Chick's house and raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen. I circled the Chick's house to make sure noone else was there. I

opened my pocket knife and put it back in my pocket. The knife was open in my pocket. There was two vehicles parked there and I got suspicious. I went on and stopped anyway. I knocked on the kitchen door with one hand and the other hand was in my pocket holding the open knife. The Chick opened the wooden door and opened the screen door a little. I asked her if her husband was there and she said, "no." I asked if I could look at the stove and she asked, "what for", and I said to see if it still worked. She told me the stove was ok and I had better get out of there. I jerked open the screen door and grabbed her. I had taken my knife out of my pocket which was still open. I pushed her back into the kitchen. She was screaming and hollering for help, and knocked the knife out of my hand. I had the knife to her side before she knocked it out of my hand. We fought in the kitchen. She fell against the stove with the side of her face and I could see that she was bleeding. I also slapped her in the face after she was bleeding. I told her stop screaming that I would cut her throat. During the fighting she went to the floor twice. The second time she went to the floor she told me she was dizzy. I turned my back to her to see if anyone was coming after I had helped her up and was holding onto one of her arms. While my back was kinda to her she picked up some orange handled scissors and I remember that my eyes flashed onto a second set of scissors. She stabbed me in the back with the scissors. I turned around right quick. I got her hand and twisted her hand behind her back and we both fell to the floor. I banged her head against the floor and the scissors fell out. I picked the scissors up and threw them away and the scissors landed in the bed room. I got up

and dragged her from behind (my arms were under her arms and around her breast) into the bedroom. She told a dog which I hadn't seen before, to bite me. The dog snapped at me and I kicked it in the throat and he slid under the bed. She tried to get away and I tripped her. She landed on her back on the floor. I told her to take her clothes off and she didn't do it. While she lay on the floor I kicked her 2 or 3 times with my foot (I was wearing cowboy boots) and stomped her once. I told her again to take her clothes off and this time she said, "yeah". She was wearing sometype of house coat, gown, and panties. She kinda sat up and pulled her panties past her knees. I told her to raise her gown up so I could see it more better and she raised it past her titties. I told her to lay back down which she did. I unzipped my pants and took my dick out. She crawled over to the scissors and picked them up. I kicked them out of her hand. I drug her back to the [/s/ J-P]

/s/ John P. Penry
Page 3 of 4 pages

[/s/ J-P] middle of the bed room and roled her over on her back. I got down on her and told her that I would kill her if she didn't make love to me. This is when I hit her 2 or 3 times in the chest with my fist. She said she would. I went on and fucked her on the bedroom floor. I fucked her for about 30 minutes before I came. It was while I was fucking her that I decided to kill her with the scissors since she stabbed me with them. After I got through I went over and got the scissors by the kitchen [/s/ J-P] door. I came back and sat on her stomach. I told her that I was going to kill her that I hated to but I thought she would squeal on me. She didn't say anything. I raised the

scissors back over my head and stabbed her in the chest, she said, "Ouch" (or something), and then moaned. I got up and [/s/ J-P] zipped up my pants. She raised up and pulled out the scissors. It looked like it was easy for her to pull out the scissors. I thought I had killed her until she sat up. This scared me and I forgot all about getting her money. I ran out the door and boogied. I got on my bike and went straight home.[/s/ J-P]

[/s/ J-P] Before I got home I heard a siren. I hid behind a house until a police car passed. Then I boogied on home. When I got home I changed shirts and my dad cleaned the blood off me. I told my dad I had fallen on a stick. I threw a sweat shirt and cowboy shirt I had been wearing on the back porch. My Dad left and I put on another shirt and went next door to see if I could get some bandaids. Sharon, a girl next door, doctored my back. She wanted me to go to the doctor but I knew I would get caught if I did. I then went back home. A good while later a cop, named Billy, came by and told me a girl had been raped and stabbed. The cop asked me if I knew anything about it and I lied and said "No". Billy asked me if I would go with him and I said okay. I knew if they didn't find the stab wound on my back I didn't have anything to worry about. I figured that the Chick I stabbed was dead by now. Some officers read me my rights and then I told them they could search my house. I showed the officers my shirt and sweat shirt I wore during the stabbing and rape. The officers and I went to the Chick's house that I had stabbed and I stayed in the car. I started worrying about what I had done so I decided to tell the officers the truth about how I had stabbed and intended to kill the Chick. I also went into the Chick's house and showed the

officers my pocket knife that I had left behind, the scissors I used to stab the Chick, and the area where the rape took place. I also went before Judge G. H. Galloway who read and explained me my rights. My father and mother came in. My father read me the same rights Judge Galloway gave me. In fact my father read me my rights 2 or 3 times and explained them to me. My father asked me if I did it, I told him that I did. My father got mad and left. [/s/ J-P]

[/s/ J-P] The officers talked to me today and I decided to tell them about the other things I have done. If it had not been the Chick I stabbed and killed, it would have been Jackie or some other Chick, but I don't think it would have been Jackie because she wouldn't have fought me. [/s/ J-P]

[/s/ J-P] I cannot read or write but this statement was read to me and it is the truth to the best of my knowledge. I can understand things, I just cannot read or write.

I cannot read but this statement of 4 pages has been read [/s/ J-P] to me [/s/ J-P] and I affirm that all the facts and statements contained herein are true and correct. I further affirm that i knowingly, intelligently, and voluntarily waived the above rights prior to and during the making of this statement. [/s/ J-P] I think I need some punishment for this and help.

WITNESSES:

Harold C. Jones

Jack [Illegible]

/s/ Johnny P. Penry
Date 10-26-1979 Time: 9:35
Page 4 of 4 Pages

CAUSE NO. 15,977-C

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
v.	§	WALKER COUNTY, TEXAS
JOHNNY PAUL PENRY	§	278TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant, JOHNNY PAUL PENRY, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 25th day of October, 1979, in Polk County, Texas. The defendant has pleaded not guilty.

1.

Our law provides that a person commits murder when he intentionally or knowingly causes the death of another.

A person commits capital murder when such person intentionally causes the death of another while such person is in the course of committing or attempting to commit the offense of aggravated rape.

2.

Our law provides that a person commits rape if he intentionally or knowingly has sexual intercourse with a female not his wife, without the female's consent.

The intercourse is without the female's consent if he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or, if he compels her to submit or participate by any threat communicated by actions, words, or deeds that would prevent resistance by a woman of ordinary resolution under the same or similar circumstances, because of a reasonable fear of harm.

A person commits aggravated rape if he commits rape, as defined above and he:

(a) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode, or

(b) compels submission to the rape by threat of death or serious bodily injury to be imminently inflicted on anyone.

3.

A person acts "intentionally", or with intent, with respect to the nature of his conduct or with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

"Sexual Intercourse" means any penetration of the female sex organ by the male sex organ.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

"Episode" means any event or series of events complete in itself by forming part of a larger one.

"In the course of committing aggravated rape" means conduct that occurs in an attempt to commit, during commission, or in immediate flight after attempt or commission of aggravated rape.

"Attempt" to commit an offense occurs if, with the specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended. If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

4.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

5.

Before you would be warranted in convicting the defendant of capital murder while in the course of committing or attempting to commit the offense of aggravated rape, you must find from the evidence beyond a

reasonable doubt not only that on the occasion in question the defendant was engaged in the commission or attempted commission of the felony offense of aggravated rape of PAMELA CARPENTER, as defined in this charge, but also that during the commission of the aggravated rape or attempted commission thereof, if any, the defendant stabbed PAMELA CARPENTER with a pair of scissors with the intention of thereby killing her. Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said PAMELA CARPENTER when he stabbed her, if he did stab her, you cannot convict him of the offense of capital murder.

Now if you find from the evidence beyond a reasonable doubt that on or about the 25th day of October, 1979 in Polk County, Texas, the defendant, JOHNNY PAUL PENRY, did intentionally kill PAMELA CARPENTER by stabbing her with a pair of scissors and that said defendant was then and there in the course of committing or attempting to commit the offense of aggravated rape of PAMELA CARPENTER, then you will find the defendant guilty of capital murder.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of capital murder, and consider whether he is guilty of the lesser offense of murder.

6.

If you find from the evidence beyond a reasonable doubt that on or about the 25th day of October, 1979, in Polk County, Texas, the defendant did intentionally or

knowingly cause the death of another person, to-wit: PAMELA CARPENTER, by unlawfully stabbing her with a pair of scissors, and you have a reasonable doubt as to whether the defendant was then and there engaged in the commission of aggravated rape or attempted aggravated rape of PAMELA CARPENTER at the time of the said stabbing, if any, then you will find the defendant guilty of murder, but not capital murder.

7.

If you find from the evidence beyond a reasonable doubt that on or about the 25th day of October, 1979 in Polk County, Texas, the defendant did knowingly cause the death of another person, to-wit: PAMELA CARPENTER, by stabbing her with a pair of scissors, but you have a reasonable doubt as to whether the defendant intentionally killed PAMELA CARPENTER as the term "intentionally" has been defined herein, then you will find the defendant guilty of murder, but not capital murder, regardless of whether you found from the evidence beyond a reasonable doubt that the defendant was then and there in the course of committing or attempting to commit the offense of aggravated rape.

If you should find from the evidence beyond a reasonable doubt that the defendant is either guilty of capital murder or murder, but you have a reasonable doubt as to which offense he is guilty, then you should resolve that doubt in defendant's favor, and in such event, you will find the defendant guilty of the lesser offense of murder.

If you have a reasonable doubt as to whether the defendant is guilty of any degree of murder as defined in this charge, you will find the defendant "not guilty".

8.

You are instructed that under our law a confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible in evidence if it appears that the same was freely and voluntarily made, without compulsion or persuasion, provided, however, that it be made in writing and signed by the accused, and show that the accused has been warned prior to making such statement or confession, by the person to whom the same is made that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial; and

(2) any statement he makes may be used as evidence against him in court; and

(3) he has the right to have a lawyer present to advise him prior to and during any questioning; and

(4) he may have his own lawyer, or, if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview or questioning at any time.

So in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the

time the defendant gave the alleged statement or confession to Chief of Police Bill Smith, if he did give it, the said Chief of Police Bill Smith did not warn the defendant in the respects just outlined, or as to any one of such requirements just outlined, then you will wholly disregard the alleged statement or confession and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of same.

If you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged statement or confession to Texas Ranger Maurice Cook, if he did give it, the said Texas Ranger Maurice Cook did not warn the defendant in the respects just outlined, or as to any one of such requirements just outlined, then you will wholly disregard the alleged statement or confession and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as

evidence in this case, ~~you must find from the evidence in this case~~, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of same.

9.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to

no inference of guilt at his trial. In case you have a reasonable doubt as to defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him. You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your foreperson. It is his/her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto, and signing the same as foreperson.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you have retired, you may communicate with this court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the court, or anyone else concerning any question you may have. After you have reached a unanimous verdict, the foreperson will certify thereto by filling in the appropriate form attached to this charge and signing his name as foreperson. Suitable forms for your verdict are attached hereto; your verdict

must be in writing and signed by your foreperson. Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this cause; and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

/s/ Joe Ned Dean
JOE NED DEAN, PRESIDING
JUDGE

G V R

The Gray-Votaw-Rogers
GENERAL ACHIEVEMENT TEST

HOB GRAY
Formerly, The University of Texas

DAVID F. VOTAW, SR.
Consultant, Educational Measurement

J. LLOYD ROGERS
Southwest Texas State College

B

★ PRIMARY 1-3

Name Ramiro Cafe Paul C- Grade Ungraded Boy or girl? Boy

Date Sept 29, 1971 Age last birthday? _____ When is your next birthday? _____

Name of your town or district: Mexia, Texas

Name of your building: Mexia State School

Name of your teacher: Francis Goodman

Test	Score
1. Reading: Vocab.	16
2. Reading: Comp.	15
3. Spelling	7
4. Arith. Reasoning	10
5. Arith. Compu.	14
	5) 52
Total Average	10
Educational Grade	1.7
Educational Age	6-10

1. The educational grade and age scales on the Educational Chart indicate the national norms for the test (*see* Manual).
2. Age and grade values above the score 50 and below the score 9 are extrapolated, or projected by statistical method.
3. In all levels of the series (Primary, Intermediate, and Advanced), the scales of scores for all the subtests have been equated so that uniform achievement is indicated if a line connecting the score points (including total average) is approximately horizontal.

DIRECTIONS given in the manual must be followed in administering this test if the results are to be compared with the national norms.

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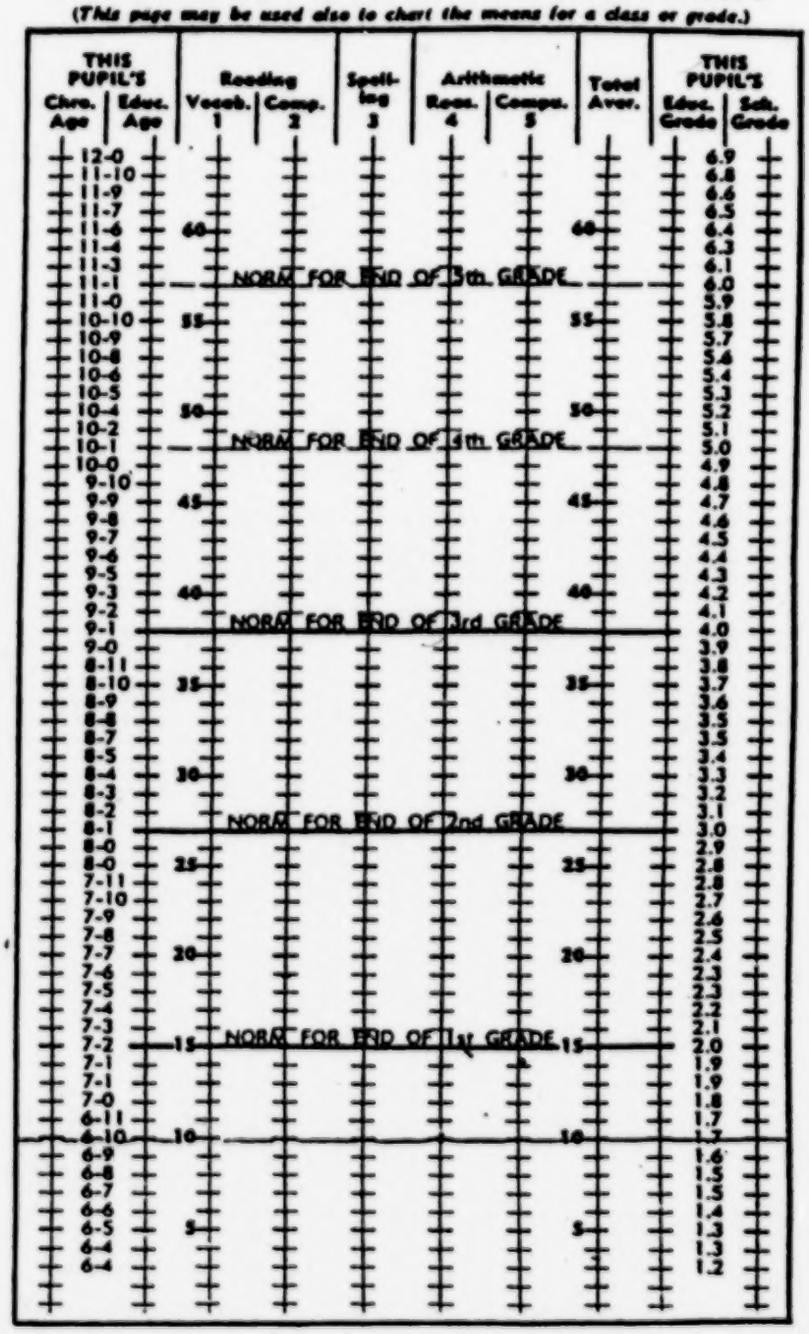
INDIVIDUAL EDUCATIONAL CHART

(This page may be used also to chart the means for a class or grade.)



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DEFENDANT'S EXHIBIT 4

BEST AVAILABLE COPY

TEST 1. READING: VOCABULARY

DIRECTIONS: Draw a line under the word that tells about the picture or makes the sentence true. Do your best to find the right word, and then draw a line under it.

SAMPLES:

a. **boy** **ball** **girl** **bird**

b. A small thing is
red **little** **good** **soft.**

1. dress boat dog kite

2. grass dress boat door

3. airplane pond snow lamb

4. drum hen car flower

5. hat drum flag toy

DEFENDANT'S EXHIBIT 5

Division of Child Psychiatry

To Whom It May Concern:

One of your pupils, JOHN PENRY, has been referred to the Division of Child Psychiatry. A description of the pupil's behavior, achievement and any impressions you have will be extremely useful in our evaluation.

We would like to know something about this pupil's academic ability. What are the typical grades? What are the strong areas? Which tasks create difficulties? Is this pupil in a slow, average, or accelerated group (if your school has such a system)?

[He is in a class for mentally retarded.]

What standardized academic or psychological tests have been given? When were these given and what scores were made on them?

[Scored about 60 I.Q. on test administered by Cameron McKinley – about 2 yrs ago.]

How does this child relate to you and to teachers?

[He listens to me when I admonish him. Says he understands – but really only understands a word once in a while.]

(Signed) /s/ R.R. Greens

(Position) Elem. Sch. Principal

(Address 4512 Highway #3 Division

(Telephone 534 4342 School
534 6035 Home

Date: 6-9-65

We appreciate your cooperation in providing this information. If you have specific questions regarding this child please let us know. Upon your request and with the parents' written permission we will share with you information and suggestions pertinent to this child's educational needs.

When completed, please mail this form
to: Henry L. Burks, M.D.
Chief
Division of Child Psychiatry
University of Texas Medical Branch
Galveston, Texas

DEFENDANT'S EXHIBIT 6

PENRY, JOHN
Age: 9-3

DCP # 65101
PSY # 5447
Dictated by:
Charles Eubanks, Dr. June Good

PSYCHOLOGICAL REPORT
August 25, 1965

John obtained a full scale I.Q. of 56 placing him in the mental defective range of intelligence. He is a very small boy who sat quietly during the testing session. Although he has a hesitant manner he seemed eager to please and readily cooperated with the examiner. When consistently faced with his inability to perform tasks he reacted with a patient persistence and continued to attempt to satisfactorily complete the tasks.

His conceptual level is very immature, primitive and undifferentiated. Both his performance on the intelligence test – verbal I.Q. of 72, performance I.Q. of 47 – and the perseveration difficulty with closure and directionality which he showed on the replication of geometric designs are indicative of a significant degree of brain damage.

He may have some feeling of possible desertion and rejection by his mother although he seems accepting of this condition.

John seems so seriously impaired that he is incapable of intellectually functioning at anything like an age appropriate level. However, he is amenable and should be capable of benefiting from special training. There seems to be little emotional overlay. He is neither discouraged by failure nor lacking in impulse control.

Impression: Mental retardation with significant degree of organicity.

Tests Given:
WISC
Verbal I.Q. – 72
Performance I.Q. – 47
Full Scale I.Q. – 56
Bender-Gestalt

Others –
House, Tree, Person
Rorschach Cards I, II, III

Charles Eubanks/June A. Good, Ph.D.
Psychologists

CE/JG/pk
9-27-65

Div. of Child & Adolescent Psychiatry
University of Texas Medical Branch
Galveston, Texas 77530

DEFENDANT'S EXHIBIT 7

Name John Paul Penry

I DATE OF EXAMINATION: 6-10-71

II REASON FOR REFERRAL: Educational prescription

III GENERAL OBSERVATION: John liked to swim. He was small for his age, neat looking, hair well-groomed. He spoke very softly.

On the WRAT, he was asked to count as high as he could. He began making mistakes after 39 but went to 100 with frequent errors, most of them occurring after 7 or 8 in the series.

Results of the D-A-P: The drawing was immature. There were two human figures and a sun. On both the human figures the ears were drawn above the eyes on the forehead rather than on the sides of the head. There was no hair on either head. The shapes of the heads were unusual. The bodies were long thin rectangles covered by straight "shifts" with 4 buttons down the front and a belt down low on the "hips." The arms and legs were straight match-sticks complete with heads. Only one of the figures had arms and legs.

Results of the Beery: Visual-Motor Integration Age Equivalent was 6 years, 0 months compared to a chronological age of 15 years, 1 month. John had difficulty with number concepts, spatial relationships, three-dimensional representation, and angularity. The results indicated a moderate to severe perceptual-motor problem.

Results of the SCQ: This 15-year-old boy reported that he likes dolls. Most of the responses were adequate but John seemed to have very little realization of his own limitations. Although he had been

in the school for three years, he apparently remembered well his mother's attitude and actions toward him. He seemed also to resent others' reactions to his own misbehavior.

Results of WRAT-Level II:

	Grade Level	Standard Score	Percentile
Reading	Gr. 1.5	57	0.5
Spelling	Gr. 1.9	59	0.7
Arithmetic	Kg. .8	53	0.1

The results were in general accord with his measured I.Q. of 51 (WISC, VIQ=55, PIQ=55, FSIQ=51, 7-8-68). He may have been a little low on arithmetic which he said he hates. On the reading test he was able to read only two of the words (in, tree). He could not read words such as milk, city, animal, himself, chin, split, and form. Although he could spell his full name he could spell only "cat" on the test. He was not able to spell "run," "arm," or "train." He was not able to copy all of the marks and had two reversals out of 18 forms.

On arithmetic he could not solve very simple addition or subtraction problems, could not read two digits together (41), and did not know that 42 is more than 28.

Results of the ITPA: Composite Psycholinguistic Age was 7 years, 2 months compared to a chronological age of 15 years, 1 month. The estimated mental age of 7-4 would result in an I.Q. equivalent of 49, approximately his measured I.Q. of 51. John was stronger on the representational level than on the automatic level. There was very little difference between the auditory-vocal and visual-motor channels. He was very weak on short-term memory, especially for auditory stimuli, functioning at the

level of a child 4 years, 8 months of age. His organizing process was his weakest generally. That included association and closure along with memory. The receptive process was a little better. His relative strength was in the expressive process, especially verbal expression. That was the only subtest on which he exceeded the norms for children 10 years of age.

IV TEST RESULTS (AND ABBREVIATIONS THEREOF):

A. WISC – Wechsler Intelligence Scale for Children (or)
WAIS – Wechsler Adult Intelligence Scale (or)
WPPSI – Wechsler Preschool and Primary Scale of Intelligence

Verbal Subtests	Scaled Scores	Performance Subtests	Scaled Scores
Information	_____	Picture Completion	_____
Comprehension	_____	Picture Arrangement	_____
Arithmetic	_____	Block Design	_____
Similarities	_____	Object Assembly	_____
Vocabulary	_____	Coding	
(Digit Span)	_____	(Digit Symbol)	_____
(Sentences)	_____	Mazes	_____
		Geometric Design	_____
		Animal House	_____
Verbal Scale IQ	_____	Performance Scale IQ	_____

Full Scale IQ 56 (5-2-66)
58 (7-8-68)

B. LIPS – Leiter International Performance Scale
M.A. ___ C.A. ___

C. Arthur Adaptation of the Leiter International Performance Scale
M.A. ___ C.A. ___

D. SIT – Slosson Intelligence Test
IQ = ___ Mental Age = ___

E. VINELAND – Vineland Social Maturity Scale
Age Score ___ Social Quotient ___

F. PPVT – Peabody Picture Vocabulary Test
Form A B Percentile = ___
Mental Age = ___ IQ = ___

G. HISKEY-NEBRASKA – Hiskey-Nebraska Test of Learning Aptitude

**H. WRAT – Wide Range Achievement Test

Subtest	Grade Level	Standard Score	Percentile
Reading	1.5	57	.5
Spelling	1.9	59	.7
Arithmetic	Kg. .8	53	.1

I. PIAT – Peabody Individual Achievement Test

Subtest	Grade Equivalent	Percentile	Standard Score
Mathematics			
Reading Recognition			
Reading Comprehension			
Spelling			
General Information			
TOTAL TEST			

J. SPACHE – Spache Reading Diagnostic Scales

1) Word Recognition – List No. ___,
Grade Placement Score ___
2) Instructional Level (Oral Performance) ___
3) Independent Level (Silent Reading) ___
4) Potential Level ("Listening Level") ___
5) Supplementary Phonics Test
a) Consonant sounds (missed):

b) Vowel sounds

c) Consonant blends (missed):

d) Common Syllables

e) Blending

f) Letter Sounds (missed):

K. T.O.B.E. – Test of Basic Experiences Level K L

Test	Standard Score	Percentile	Stanine
Mathematics			
Language			
General Concepts			
Science			
Social Studies			

L. The Basic Concept Inventory

**M. D-A-P – Draw-A-Person Immature drawing. Evidence of perceptual difficulties.

**N. BEERY – Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI)
C.A. = 15-1 VMI Age Equivalent = 6-0

**O. ITPA – Illinois Test of Psycholinguistic Ability

RESULTS OF THE ITPA

Subtest	Language Age	Scaled Scores	Deviation from Mean Scaled Score +	Deviation from Mean Scaled Score -
1 Auditory-Reception	8-0	Not applicable Test designed for children 2-10.		
2 Visual Reception	6-5			
3 Auditory Association	5-9			
4 Visual Association	6-10			
5 Verbal Expression	10-11			
6 Manual Expression	8-4			
7 Grammatic Closure	6-0			
8 Visual Closure	8-0			

9 Auditory Sequential Memory	4-8
10 Visual Sequential Memory	6-6

Supplementary Tests:

11 Auditory Closure	5-1
12 Sound Blending	

TOTAL: Language Age 7-2 Chronological Age 15-1
Mental Age 7-4

P. WEPMAN – Wepman Auditory Discrimination Test, Form 1

**Q. SCQ – Sentence Completion Questionnaire Unusual responses included the statement that he likes dolls. Little recognition of limitations.

R. TAT – Thematic Apperception Test

S. CAT-H – Children's Apperception Test – Human

T. Piers-Harris Children's Self-Concept Scale

A. Significant Cluster Scores
1. Behavior
2. Intellectual & School Status
3. Physical Appearance and Attributes
4. Anxiety
5. Popularity
6. Happiness and Satisfaction

Comments: _____
_____
_____
_____

B. Norm Scores (grades 4-12 only)
Percentile ___ Stanine ___

V SUMMARY AND CONCLUSIONS:

D-A-P: Immature drawing. Evidence of perceptual difficulties.

Beery: VMI Age Equivalent 6-0
Chronological Age 15-1

Results indicated a moderate to severe visual-motor integration problem.

SCQ: Some unusual responses included the statement that he likes dolls. There was little recognition of his own limitations.

WRAT-Level II:	Grade Level	Standard Score	Percentile
Reading	Gr. 1.5	57	0.5
Spelling	Gr. 1.9	59	0.7
Arithmetic	Kg. .8	53	0.1

Results were generally in line with his measured I.Q. of 51.

ITPA: PLA 7-2
CA 15-1

John's relative strength was in verbal expression and to a lesser degree manual expression. He was very weak on sequential memory tasks, especially for auditory stimuli. He was generally weak on organizing abilities.

Attachments 47

VI EDUCATIONAL IMPLICATIONS:

John Paul needs a lot of practice on visual-motor integration tasks. This should not present any problem for the teacher because John said that he likes to draw. Regular, frequent, brief periods of remediation exercises should be included in his program

of learning. He may need to begin by tracing and gradually proceed to higher levels of visual-motor skills. See the attached sheets for suggestions and procedures to help overcome this deficit.

There are a number of specific and general remediation procedures designed to help the child to a higher level of performance on academic skills such as those measured by the Illinois Test of Psycholinguistic Abilties and the Wechsler Intelligence Scale for Children. On the attached sheets you will find John Paul's current level of functioning written in at the top. There is a check mark beside the place where remediation work should probably begin. Of course, the classroom teacher will have to use her own judgment based on a longer period of acquaintance with and observation of the child. The sheets contain suggestions and recommendations. They may have to be adapted or modified to suit the teacher and the pupil.

MEXIA STATE SCHOOL
Mexia, Texas

Intake Summary

NAME: Johnny Paul Penry BORN: 5-5-56

NO: 31602 Adm: 5-23-68

NOTIFYING ADDRESS:
Mr. and Mrs. John G. Penry
4202 Bruce, Box 387
Bacliff, Texas 77518

REPORT DATE: 7-16-68

LEGAL STATUS: The parents retain custody of this child.

REASON FOR REFERRAL: The family was unable to control subject in the home. Also, subject's siblings must be considered. The doctors advised the family that subject needs special training.

DEVELOPMENTAL AND MEDICAL HISTORY: The mother was 18 years of age at the birth of subject. Born previous to subject's birth was one normal girl; subsequent to subject's birth a normal girl was born and also a boy of apparent normalacy.

The mother received prenatal care and although she is diabetic, she had general good health during this pregnancy. During pregnancy the mother had hypertension. X rays of the abdomen were taken for unknown reasons. Delivery was at full term and labor was spontaneous. The baby weighed 7 lbs., 12 1/2 ozs., and breathed spontaneously. Mrs. Penry suffered a postpartum psychosis after the birth of both male children. After the birth of

subject she was in Oklahoma State Hospital for ten months.

Soon after mother's return to the home, subject received severe burns on his legs and lower part of the body. The mother reported that while she was bathing him in the kitchen sink she left him alone for a short period and he turned on the hot water. He now has severe scars on his legs. He complains frequently of his legs and feet hurting.

At ten months, subject was described as being a high tempered child and if he didn't get his way he would have temper tantrums. He was said to be hyperactive and it is reported that at one time he jumped out of his high chair and broke his arm. He walked at age one and began talking the same year. He head-banged until he was five years old. He is able to perform most self-help skills but is occasionally enuretic.

Mental deficiency was noticed at seven years. The etiology was determined to be organic brain syndrome due to birth trauma. An EEG given to the child revealed normal waking and sleep tracing.

DESCRIPTION OF PERSONALITY: This normal appearing, Caucasian male appears undersized for his age of twelve. His parents report him as being happy, aggressive, excitable, and stubborn. If he does not get his way he has a temper tantrum and bites, pinches, and chokes other children. He plays fairly well with other children as long as he is watched; otherwise, he is hateful. He wanders from home if left unattended. He is careless and not afraid of getting hurt. Under supervision, subject will work in the yard and house.

SCHOOL HISTORY: Johnny started to school at age six, but proved to be uncontrollable in the classroom and failed the first grade. The next year, his teacher advised that he be placed in special education classes. He was taken out of this class because he still could not be controlled. Also, his mother thought that special education was doing him no good.

PSYCHOLOGICAL EVALUATIONS: In July and August, 1965, Johnny was seen at the University of Texas Medical Branch in Galveston for diagnostic evaluation. John was a small boy who sat quietly during the testing situation. He had a hesitant manner but seemed eager to please and readily cooperated with the examiner.

The results of psychological testing found Johnny to have a very immature conceptical level and was primitive and undifferentiated.

Verbal IQ = 72
PIQ = 47
FSIQ = 56

An EEG indicated normal waking and sleep tracing. It was the opinion of the clinic that this boy represented a classical example of an organic brain syndrome with mental retardation and behavioral disturbance.

FAMILY HISTORY: John Garner Penry, father of subject, was born September 10, 1932, in Livingston, Texas. He received a high-school education and is now employed by American Bakeries Company of Texas City, Texas.

Shirley Ann Lane Penry, mother of subject, was born January 23, 1938, in Conroe, Texas. She received a tenth-

grade education. She married John C. Penry on March 23, 1953. This is the only marriage for both parents.

SIBLINGS: Trudy Ann Penry, born May 17, 1954, in Houston, Texas, is a student and lives at home.

Sally Belinda Penry, born 9-11-58, in Bacliff, Texas, is a student, living at home.

Jesse Dwane Penry, born December 18, 1962, in Bacliff, Texas, is living at home.

INTAKE INTERVIEW: Subject was presented for admission by his parents. Throughout the interview both parents seemed reluctant to discuss their true problems and evaded direct questions concerning their relationship with subject. The father was greatly concerned about subject's religious training as a Jehovah Witness and had difficulty in controlling his emotions (his lips quivered and eyes filled with tears) as he quoted scripture and explained his beliefs. The mother, though never removing her dark sun shades, wept frequently throughout the interview and had very little to say. Both parents were rigid when parting with subject and showed no affection. The mother did not say anything to subject, but hurridely went to the car, crying and sobbing aloud for a few seconds, I got the impression that she felt this was expected of her.

A few days after admission, when subject's hair was cut, it was discovered he had many small scars over his head. When asked how he received the scars, he said they

were from cuts made by a large belt buckle which his mother used when whipping him.

/s/ Pam Naylor
Pam Naylor, Student
Caseworker

(Mrs) Annette Parker
Caseworker, Team III

PN/rp/cba

DEEP EAST TEXAS REGIONAL
MENTAL HEALTH MENTAL RETARDATION SERVICES
TRINITY COUNTY OUTPATIENT CLINIC

Psychiatric Evaluation

NAME:
JOHNNY PAUL PENRY CASE: ~~1264~~ 7722

WORKER: DATE: May 19, 1977
FELIX PEEBLES, M.D.

PRESENTING PROBLEM:

This client was referred to the Trinity County Outpatient Clinic for psychiatric evaluation by Polk County District Judge Ernest C. Coker.

PERSONAL HISTORY:

This client is a 21 year old white single male who was born May 5, 1956. He was born in Lawton, Oklahoma and has lives much of his life in Texas. There is no history of abnormality in his birth, however, he does have a history of temper tantrums, bedwetting, and nightmares and does occasionally bite his nails. He indicates that the bedwetting is still a problem at times.

He was very slow to learn and had a later than average history of learning to walk and talk and do all of the other things that average children do. He was entered in the 1st grade in school and went most of that year but did not proceed in school. He had difficulty learning and understanding and could not compete with the other first graders. He has never learned to read and write.

He says he is in good physical health and he has had no major illnesses and no major surgery. He said he had

some tests in Ben Taub Hospital in Houston but he does not know the date. He said he was in one accident about 6 months ago after he had stolen a car. There were no apparent ill effects. He is not under a physician's care at this time and is not taking any medication. He believes he remembers taking some Mellaril and Thorazine back through the years from time to time.

He has held a number of jobs mostly around restaurants such as busboy or dishwashing. He does relate that he worked at the Sirloin Stockade in Lufkin, Texas but he was fired because he took the ice cream machine apart to clean it and could not put it back together. He thinks it was about 10 weeks that he was on the job at that location.

The client's father is John Penry, age 42 and is described as being in good physical health. The client indicates that he does not have a good relationship with his father. He says he has a lot of childhood memories of his father always being too hard on him. He has expressed being afraid of his father. He says his father calls him retarded and that this makes him very mad because he is not retarded. He just has some difficult in learning.

This client's mother is Shirley Penry and the client does not know her age. He says, "My mom takes care of me". He believes his parents are divorced and that there is some conflict between his parents and that there has been some conflict for as long as he can remember. He prefers his mother to his father.

This client is the 2nd of 4 siblings, he has an older sister 23 years of age and he does not get along with her because, "She tells on me". There is a younger sister age

18 and a younger brother who is 15. Prior to the time he got into his present trouble he was living with his step-brother who is 23 years of age.

He remembers fighting with his parents when he was growing up and running away from home quite a bit. He indicates that he was physically abused as a child which caused his rebellious reactions.

PRESENT ILLNESS:

This client is a 21 year old Mexican-American single male who has a history of having been admitted to Austin State Hospital and transfered to Rusk State Hospital because he was a legal resident of Polk County which was in Rusk State Hospital's catchment area. This was from the latter part of 1973 until the early part of 1974. He relates the story of seeing a woman in Livingston and he liked her looks very much and told her a story about his brother getting in a car wreck and wanting him to take her down the street to it and gained entrance into the car. He related that he had a switch blade knife and he produced it and ordered her to drive out of town and came to a road turning off of the highway where there was a gate. He said he ordered her to ram the car through the gate and break it down and she did not and he took the wheel of the car and broke through the gate and drove down into an area out of sight from the road and did have sexual intercourse with her.

They were driving back toward Livingston, Texas and something happened to the car and he and the female whom he had abducted and with whom he had had sexual intercourse got out and started walking. They met a pickup and he got out in the middle of the road and

flagged the pickup down. He asked for a ride and at that time the woman told the man that she had been abducted and raped by this client, Johnnie Paul Penry, at which time the man produced a shotgun he had in the pickup and held it on Johnnie Paul Penry and turned him in in Livingston, Texas for this offense. Johnnie says he is charged with Kidnapping and Rape.

He believes this was in February but he does not know what date and says that he has not seen an attorney and does not know when disposition will be made of his case. He thinks he has been in the Polk County Jail for about three months.

He says that he has been arrested many times for problems relating to stealing, arson, and other crimes. He relates that he has on occasion heard voices and saw things, but he is very vague and I feel that he probably learned this in Rusk State Hospital and is using this as an excuse to cover up his offenses. He said he meant no harm to the woman whom he raped that he had never had a woman before and he wanted to see what it would be like to have a woman. He admits that he has been having problems with the law and with other people for as long as he can remember.

MENTAL STATUS:

His speech is fairly spontaneous and is entirely coherent and relevant at the time of this interview. I see no evidence of any auditory or visual hallucinations or of any delusional thought content or psychotic thought process at the time of this interview. His psychomotor activity is slightly accelerated and his mood is quite anxious and his affect is appropriate for his mood.

He is oriented as to the month and date of it being May 19, but he is unsure of the year. He guesses all the way from 1971 to 1975. His memory is moderately impaired for both recent and remote past events. On retention and recall he can only repeat one number correctly in forward order and none in reverse order, whereas the average person can repeat 5 or 6 numbers correctly both in forward order and reverse order. He is unable to interpret proverbs at all and certainly is unable to do any abstract thinking. On his grasp of general information he reveals that he believes Nixon is President and has no idea who the Vice President of the United States or the Governor of Texas, or of any other important people are at this time. His judgement and insight are quite severely impaired.

DIAGNOSIS:

1. Mental Retardation-moderate.
2. Adjustment Reaction of Adult Life.

It is my professional opinion that Johnnie Paul Penry is presently competent to stand trial and assist his counsel in the preparation of his defense. However, he is moderately retarded and his judgement and insight are moderately to severely impaired. He also has some antisocial features which account for him not learning by his past mistakes and making some of the same mistakes over again. He has little regard for others or even himself. His primary interests being immediate gratification of his impulses even without regard to consequence to himself.

It is my further professional opinion that Johnnie Paul Penry is and was sane at the time of the commission of the offense. At that time, and certainly at this time, he shows no evidence of psychosis or a break with reality or

of not being aware of what he was doing or what was going on around him. It is true that his judgement and insight are impaired but he is sane in the legal sense.

It is my further professional opinion that if Johnnie Paul Penry were released from custody that he would be dangerous to other persons. I base this judgement on the fact that he tells me he did have a weapon and did produce this weapon and did threaten the woman with a switch blade knife if she did resist him. He does not have adequately developed internal self controls and has a long history of conflicts with people and difficulty with his interpersonal relationships leading back to childhood and conflicts with his parents. And by his own admission he has been arrested "many times" for problems relating to stealing, arson, and other crimes. A person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately. Another thing that is disturbing is antisocial features which he has exhibited consisting of the apparent inability to love or be loved, to make lasting friends, to develop adequate interpersonal relationships, lack regret for past offenses. He also has not learned from his mistakes and is likely to continue making some of his same mistakes over again.

/s/ Felix Peebles
Felix Peebles, M.D.
Psychiatrist

FP/mw

TEXAS REHABILITATION COMMISSION

CERTIFICATION OF ELIGIBILITY, INELIGIBILITY, OR EXTENDED EVALUATION
(RSM No. 02-5)

In accordance with the Texas State Plan for Vocational rehabilitation, I hereby certify that in the case of Johnny Paul Penry

1. [X] There exists a mental or physical disability:

Mental Retardation – Mild with 532102
Anti social Primary Disability Tendencies Code

Poor Visual Acuity-Hyperopia 149.02
Secondary Disability Code

*The resultant functional limitations of the disability(s) are as follows:

1. Inability to perform basic academic skills.
2. Limited vocational experience.
3. Frequent impulsive and anti social acting out behaviors.
4. Poor visual acuity-hyperopia.
5. Unstable family background.
6. Lack of financial resources.

2. [X] The disability as described above constitutes a substantial handicap to this individual's employment in that: (RSM No. 02-4, para. 1.A.) This client is prevented in accepted job training in many skilled areas due to his inability too perform basic academic skill. He is unable to complete written job applications. He has little exposure to the labor market and is not aware of the expectations of employers. Johnny has little

internal control of his basic drives which has resulted in frequent impulsive acting out behavior. He has served 4 years of a 5 year sentence to TDC for rape and has a long history as a juvenile of anti social behaviors. His recent physical exam revealed a visual defect that can be corrected with prescription lenses. Johnny's family background is very disturbed and has lead to many of his anti social behavior and directly influenced his lack of basic education. He is frequently upset by his family's current religious affiliation which contrasts his social skills. At this time Johnny has no financial resources from a job or the family.

3. [ ] I am unable at this time, to make a determination that Vocational Rehabilitation Services will benefit this individual in terms of employability, unless there is an extended evaluation to determine rehabilitation potential. (RSM No. 04-1.)

Counselor _____ ____ Date _____
Signature No.

4. [X] There is a reasonable expectation that Vocational Rehabilitation Services will benefit this individual in terms of employability (RSM No. 02-4, para. 1.B., and RSM No. 06-4)

5. [ ] The requirements for eligibility were not met for the following reasons: (RSM No. 02-5.)

[ ] Handicap too severe

[ ] No disabling condition

[ ] The disability does not constitute a substantial handicap to employment

[ ] Other _____
(Specify on back)

Counselor /s/ [Illegible] 567 Date 10-17-79
Signature No.

Form TRC-405A (F.e., Feb. 1979) (Supersedes Form TRC-405 dated Jan. 1, 1979) 9

TEXAS REHABILITATION COMMISSION

CLIENT ASSESSMENT AND PLANNING
(To be completed at the time of
or prior to development of the IWRP)

1. Client Vocational Assessment

A. Vocational Assets

1. Young age-23
2. Overall good physical health.
3. Verbal expressions of motivations to return to the competitive labor market.
4. Neat in personal appearance.
5. Cooperative in planning his vocational program.

B. Vocational Limitations

1. Lack of basic academic skills-inability to read or write.
2. Limited vocational experience.
3. Lack of appropriate internal control system resulting in frequent antisocial and aggressive behaviors.
4. Lower intellectual level of functioning creating interference in clients ability to learn adaptive behaviors.
5. Poor visual acuity to perform fine motor tasks.
6. Family discord.

2. Describe how the planned vocational objective relates to the client's vocational assets, limitations, and vocational handicap.

We will attempt to enhance this clients vocational assets by providing him a stable living arrangement and a job. This client will require intensive personal social adjustment training to learn basic adaptive behaviors. He has to learn more control in order to remain outside penal institutions.

3. Describe how the services to be provided will remove or reduce the vocational handicap.

We will provide the client with:

1. Personal Social Adjustment Training
2. Work Adjustment Training
3. Single vision lenses and frames to correct his poor visual acuity.

This clients behaviors can be adapted to allow him to become more socialized. I feel he can become financially independent with a job placement. He will require assistance in locating a job. His handicapping conditions can be somewhat reduced to enable him to function appropriately in society.

TEXAS REHABILITATION COMMISSION –
VOCATIONAL REHABILITATION DIVISION

REPORT OF GENERAL PHYSICAL EXAMINATION

CONFIDENTIAL*

SECTION I (V R AGENCY FILLS OUT)

DATE 09-25-79

Penry	Johnny	P
(Last Name)	*(First Name)*	*(Middle Name)*

_____	White	M xF	(S) M OTHER
(Age)	(Race)	(M/F)	(Marital)

RR. 1, Box 1426 ([Illegible])

Livingston (City or Town)

Polk (County) | Texas (State) | 77351 (Zip)

SHORT DESCRIPTION OR HISTORY OF ALLEGED HANDICAP (BY COUNSELOR) Mental Retardation-Mild

SIGNATURE _____ ([Illegible])

ABOVE NAMED IS APPLYING FOR VOCATIONAL REHABILITATION SERVICES REGULATIONS REQUIRE A RECORD OF PHYSICAL EXAMINATION TO ASCERTAIN PRESENCE OR ABSENCE OF PHYSICAL DISORDERS SO THAT DETERMINATION OF ELIGIBILITY FOR SERVICES CAN BE MADE. PROMPT COMPLETION OF THE FORM BELOW WILL BE APPRECIATED.

SECTION II (BY PHYSICIAN)

CONDENSED MEDICAL HISTORY Childhood dis 3'-2nd degree L leg burns at age 4

IF APPLICANT IS YOUR PREVIOUS PATIENT. PLEASE STATE SIGNIFICANT DISORDERS No.

EXAMINATION:

HEIGHT 5'7" WEIGHT 135½ PULSE RATE 102 BLOOD PRESSURE 130/74 VISION (SNELLEN) RT 20/___ L 20/___ WITH GLASSES IF AVAILABLE BY 20/___ L 20/___

HEARING (ORDINARY CONVERSATION) RT ___ 20 20 FT LEFT ___ 20/20 FT

		NORMAL ✓	ABNORMAL X
1	HEAD SCALP	✓	
2	EYES		X
3	EARS-NOSE-THROAT	✓	
4	DENTAL-MOUTH	✓	
5	NECK	✓	
6	SKIN		X
7	CHEST LUNGS	✓	
8	HEART ARTERIES	✓	
9	ABDOMEN	✓	
10	HERNIAS	✓	
11	BONES-JOINTS	✓	
12	MUSCULAR	✓	
13	NEUROLOGICAL	✓	
14	GENITO URINARY	✓	
15	RECTAL	✓	
16	PELVIC		
17	OTHER		

PLEASE ELABORATE ON ALL ABNORMALS CHECKED (BY NUMBER)

2 – Apparent poor vision – Difficult to test pt. don't know read.

6 – Scaring on L calf and behind L knee. 2nd to 3'. 2nd degree burns at age 4.

[Illegible] APRIL 1977.

EXPLANATION

LABORATORY

URINE DIPSTICK – URINALYSIS FOR PROTEIN, SUGAR AND HEMOGLOBIN IS REQUIRED OR COMPLETE URINALYSIS WITH MICROSCOPIC IF EXAMINER FEELS IT IS NEEDED

BLOOD PHYSICIAN MAY DO HEMORGLOBIN (OR HEMATOCRIT) IF INDICATED SEROLOGY ONLY WHEN INDICATED

X-RAY WITH THIS GENERAL EXAMINATION, CHEST X-RAYS (AP & LATERAL) ARE AUTHORIZED WHEN PHYSICIAN INDICATES NEED SHOULD BE OBTAINED IF EVIDENCE OF PAST OR PRESENT TB EXISTS OR PRESENCE OF OTHER ACTIVE PULMONARY DISEASE IS FOUND DURING EXAM OTHER X-RAY STUDIES REQUIRE PRIOR AUTHORIZATION FOR PAYMENT BY COUNSELOR.

REPORT OF LAB OR X-RAY

LIMITED URINALYSIS (CHEMICAL DIPSTICK)
PROTEIN _____

SUGAR _____

HGS _____

COMPLETE URINALYSIS
SP GR 1.027

PM 5.0

PROTEIN +

SUGAR Neg

MICRO [Illegible]

X-RAY OF CHEST – (BRIEF OF ABNORMAL FINDINGS)

_____

DIAGNOSTIC FINDINGS AND/OR IMPRESSIONS

Depressive reaction by history
[Illegible]

YOUR OPINION:

CAN THE MAJOR DISABILITY BE REMOVED [✓] YES [ ] NO OR SUBSTANTIALLY IMPROVED [✓] YES [ ] NO BY MEDICAL OR SURGICAL TREATMENT

DO YOU RECOMMEND:

SPECIALIST CONSULTATION [✓] YES [ ] NO. IF YES SPECIFY TYPE Psychiatric

EYE REFRACTION [✓] YES [ ] NO: OTHER DIAGNOSTIC PROCEDURE [ ] YES [ ] NO

PROSTHETIC APPLIANCE [ ] YES [ ] NO.

HOSPITALIZATION [ ] YES [ ] NO

TREATMENT [ ] YES [ ] NO.

PLEASE ELABORATE ALL "YES" ANSWERS

Pt needs poss Psychiatric Consultation as well as [illegible].

PHYSICAL CAPABILITIES

(USE THE FOLLOWING SYMBOLS ✓ = NO LIMITATIONS, X = LIMITATIONS, 0 = TO BE AVOIDED:

PHYSICAL ACTIVITIES

PULLING	✓
LIFTING	✓
PUSHING	✓
REACHING	✓
WALKING	✓
STOOPING	✓
KNEELING	✓
OTHER	✓

WORKING CONDITIONS

OUTDOORS ✓

INDOORS ✓

HIGH HUMIDITY ✓

DRY ✓

DUSTY ✓

MARKED TEMP CHANGES ✓

OTHER ✓

REMARKS

SIGNATURE BY EXAMINING PHYSICIAN

/s/ [Illegible] (M.D. OR D.O.)
(Physician)

CARLOS M. LIANES, M.D.
([illegible])

203 E. Polk
(Address)

Livingston, Tx. 77351

10-9-79
(Date of Signature)

*ALL INFORMATION IS TO BE TREATED AS CONFIDENTIAL AND TO BE USED ONLY IN THE ADMINISTRATIVE PROCESS OF REHABILITATION OR DISABILITY. DETERMINATION AS REQUIRED TO ACCOMPLISH THESE PURPOSES.

EXAMINEE HAS THE LEGAL RIGHT TO SEE THIS REPORT IF HE/SHE SO REQUESTS.

VOCATIONAL REHABILITATION DIVISION
OF THE
TEXAS REHABILITATION COMMISSION

[SEAL]

207 N. Houston
Livingston, Texas 77351

PSYCHOLOGICAL REPORT SUMMARY

Name: PENRY, Johnny P.
Date of Birth: 5/5/56
Age: 23
Date of Testing: 9/18/79

Referral: Jackie Tims
Counselor-TRC

REASONS FOR REFERRAL:

1. Diagnosis for determination of mental disorder.
2. To obtain data to assist in personal and vocational guidance and counseling.
3. To determine level of intellectual functioning and academic achievement levels.

BACKGROUND INFORMATION AND SOCIAL HISTORY:

Johnny was able to provide very little background information in regard to his early social history. He did, however, indicate that his mother took him out of school before he finished the first grade and he has received no further formal schooling. It should be noted that Johnny appears to be functioning within a mild to moderate range of mental retardation resulting in poor long-term memory and this inability to recall social history.

Johnny is single and presently lives with his aunt whom he is totally dependent upon for support. In talking with the counselor in this case, I learned that Johnny's mother has in the past had mental problems and that this has resulted in Johnny's living with his aunt. Again, Johnny could provide very little information about his family relationships except to say that he liked working with his father who ran an auto body shop. It should be noted that Johnny's social history as obtained through TRC Case Records also indicates that Johnny's mother and father apparently neglected and abused Johnny in the past and that they show no interest or concern for him at this time.

Johnny was convicted for rape in February, 1977 and received a five-year confinement at TDC. He served three of these five years and was released on parole. In addition to his conviction for rape, Johnny has in the past been charged with arson on two occasions, but apparently was not convicted. Johnny indicated that he had learned his lesson by his confinement at TDC and did not want to become involved in any behavior that might send him back. It should be noted that Johnny reports that he had a very hard time while at TDC and was often beat up by other inmates and by the guards. Johnny indicated that many of his fights were the result of his refusal to let anyone push him around which suggests that his attitude may have played a major role in his difficulties.

Vocationally, Johnny can relate very little occupational experience and indicates that his only job lasted for approximately four weeks and was as busboy at a local restaurant. Johnny feels that he has been unable to find employment since his release from TDC due to discrimination against ex-convicts. Johnny indicated that he lost

his one and only job because of lack of transportation, at the time of evaluation, Johnny expressed a vocational interest in becoming employed in filling station or auto body work. Johnny reports no health problems that would be either physically or vocationally limiting for him.

BEHAVIORAL OBSERVATIONS:

Johnny exhibited good cooperation and effort while in testing and appeared to be working to the limit of his ability on all tasks presented. He exhibited an average amount of activity with fairly constant tempo and good motor coordination. Johnny appeared to be shy and somewhat reserved and carried on very little spontaneous conversation. He expressed himself using phrases or very short sentences and maintained poor eye contact while conversing. He exhibited no excessive self-criticism and his attention to and understanding of problems and instructions was below average and he frequently required elaboration in that area. Due to consistent effort by the client and lack of problems in test administration, however, all scores appear to be valid.

INTELLECTUAL FUNCTIONING:

Johnny has achieved a verbal scale IQ on the Wechsler Adult Intelligence Scale of 56 which falls within a mild range of mental retardation according to the Diagnostic and Statistical Manual. The standard error of measure for the verbal section of the test is three; therefore, Johnny's verbal scale IQ is likely to fall between 53 and 59 sixty-eight percent of the time. He has achieved a dull, normal

classification of functioning in his general alertness to environment, range of education and information gained over time and exposure to environment, ability to assimilate facts, ability to use common sense judgment and reality testing and in his ability to evaluate past experiences. He has achieved a borderline mental defective classification of functioning in his ability to show mental alertness, concentration and reasoning in doing calculations in practical arithmetic, ability to utilize rote memory, control of attention and immediate recall and in his ability to assimilate and use words meaningfully. He has achieved a mental defective classification of functioning in his ability to develop concepts from a concrete and functional level to a higher level. All scores on the verbal section between subtests fall within a normal four point range. Johnny has achieved a performance scale IQ on the Wechsler of 72 which falls within a borderline range of mental retardation according to the Diagnostic and Statistical Manual. The standard error of measure for the performance is four; therefore, Johnny's performance scale IQ is likely to fall between 68 and 76 sixty-eight percent of the time. He has achieved a dull, normal classification of functioning in visual memory and motor coordination and capacity to take new simple learning tasks in stride, ability to analyze wholes into their component parts and planning abilities, comprehension of total situations and general alertness in social situations and in his ability to work toward an unknown goal and persist at a task requiring neuro[illegible] control and visual motor planning. He has achieved an average classification of functioning in his conceptual and perceptual abilities and ability to discriminate essentials from nonessentials. All scores on the performance section between subtests also

fall within a normal four point range. Johnny has achieved a full scale IQ on the Wechsler of 61 which falls within a mild range of mental retardation according to the Diagnostic and Statistical Manual. The critical ratio of fifteen between the verbal and performance sections of the test was exceeded by one point with the higher score being on the performance section of the test. This difference between the verbal and performance scale IQ's more than likely reflects Johnny's lack of educational opportunities, as well as his general mental retardation. It should be noted that Johnny's capacity for associative thinking is very limited; therefore, Johnny is likely to be very concrete in his thinking. He also exhibits very poor expressive language skills and abstract thinking abilities. These deficits in abstract and associative thinking and poor verbal concept formation result in very poor long-term memory. In addition to his problem with long-term memory, Johnny is very likely also to have a very poor short-term memory. This problem is the result of poor ability for attention and concentration, as well as poor ability to manipulate thought patterns. In addition to deficits in long and short-term memory as indicated above, Johnny exhibits a very limited word knowledge and poor ability to integrate experiences and evaluate them in socially acceptable ways. It should, however, that Johnny's test scores do indicate average alertness in visual observation and attention to detail. His ability for visual motor and fine motor coordination and his ability to see part-whole relationships appear to be within a dull, normal range. The Bender Motor Gestalt Test indicates impairment of cognitive functioning and Johnny has achieved grade norm scores on the Wide Range Achievement Test of *1.7 in reading, 2.2 in spelling and kg. .8 in*

arithmetic. All scores fall within a defective classification of achievement as measured by that test for his age. It should be noted, however, that when standard scores from the Wide Range Achievement Test are compared with IQ's as measured by the Wechsler Adult Intelligence Scale, Johnny appears to be achieving at or near his expected level according to his IQ and age. In addition to a measured *full scale IQ of 61*, Johnny lacks ability to apply basic academic skills to daily life activities, has exhibited inappropriate reasoning and judgment in daily life activities, has not mastered basic social skills which would allow successful participation in group activities and interpersonal relations, is unable to function independent within the community and in gainful employment and has exhibited an inability to conform to standards set by the community.

WIDERANGE ACHIEVEMENT TEST

	Raw	Grade	Percentile	Standard
Reading	18	1.7	.7	59
Spelling	6	2.2	.9	67
Arithmetic	7	Kg.8	.2	54

WECHSLER ADULT INTELLIGENCE SCALE

TEST	RAW SCORE	SCALED SCORE
Information	4	4
Comprehension	7	4
Arithmetic	3	3
Similarities	0	0
Digit Span	6	2
Vocabulary	9	2
	VERBAL SCORE	15

Digit Symbol	21	4
Picture Completion	10	8
Block Design	16	5
Picture Arrangement	14	6
Object Assembly	20	6
PERFORMANCE SCORE	29	

VERBAL SCORE	15	IQ	56
PERFORMANCE SCORE	29	IQ	72
FULL SCALE SCORE	44	IQ	61*

*61 Circled on original.

PERSONALITY DYNAMICS:

Personality testing and social history indicates that Johnny tends to be unconventional and unconcerned over everyday matters and will be unsteady in purpose. He is also apparently lacking in super-ego strength, that is, Johnny tends to feel few obligations, will tend to evade rules and will tend to follow his own urges with very little regard for social demands. His freedom from group influences may result in anti-social acts, as well as difficulties which involve rapid action with insufficient consideration and thought.

In general, Johnny may be characterized as being an individual who has very poor coordination between body drives and intellectual control, resulting in the presence of many unsatisfied drives. He also tends to be overly defensive in inter-personal relations and may tend to protect himself from anticipation from hurt from others through aggressive acts.

DIAGNOSIS: *Mild mental retardation with anti-social tendencies*

DSM II CODE: 311

FUNCTIONAL LIMITATIONS:

1. Lack of academic skills in reading, spelling and arithmetic.
2. Lack of vocational experience.
3. Very limited ability for associative thinking, resulting in poor long-term memory.
4. Poor ability for attention and/or concentration.
5. Overly defensive attitude may interfere with ability to maintain interpersonal relations and to accept supervision.
6. Impulsiveness and freedom from group influences may result in anti-social acts, and vocational unreliability.
7. Low intellectual functioning will interfere with ability to learn job skills.
8. History of incarceration at TDC will interfere with ability to find employment.

SUMMARY AND RECOMMENDATIONS:

It is felt that Johnny will continue to need close supervision, both in personal affairs, as well as in a vocational setting. It is also felt that without such supervision, Johnny may tend to violate the stipulations of his parole. Recommendations include:

1. Individual counseling through the local MHMR Outpatient Clinic.
2. Continued close supervision by his parole officer, if possible.
3. Vocational guidance and counseling.

/s/ Tim L. Monroe
Tim L. Monroe, M.S., Psychologist
Texas Rehabilitation Commission

10/09/79

/sm

TEXAS REHABILITATION COMMISSION

Referral for Psychological Evaluation

TO Tina Monroe
Name of Psychologist/Evaluator

Tests Requested Full Battery ____
Routine Battery ✓ Other ____

If additional or substitute tests are needed, include an explanation on the evaluation report

FROM Jacquelyn Tims, 207 N. Houston
Livingston Texas 7735
Counselor, TRC Office, Address and Phone Number

DATE and time client is scheduled for evaluation
Tuesday, September 18, 1979 at 1:00 P.M.

I. FOCUS OF EVALUATION

A. Reason for referral.

✓1 Diagnosis for determination of mental disorder (if appropriate)

_2 To obtain data to assist personal counseling

✓3 To obtain data to assist in vocational counseling and guidance

B. Special question(s) to be answered by the psychological evaluation.

_____

_____

_____

II. CLIENT INFORMATION

A. Penry Johnny P. 23 White
Name Last First Middle Age Race

[Illegible] 007/97/2381 "02" Applicant
Location Soc. Sec. No. R Status (Describe)

Speaks [✓] English [ ] Spanish Reads [✓] English [ ] Spanish

B. Vocational objective(s) under consideration if any,

a. _____

b. _____

C. Current Disabilities

	Suspected	Reported	Established
a. Mental Retardation Mild	_____	_____	_____
b. _____	_____	_____	_____
c. _____	_____	_____	_____

D. History of client includes:

___	Accident [illegible]	___	Illegitimate pregnancy
___	Attempted suicide*	✓	Incarceration
___	Brain damage or other neurological disorder*	___	Irregular discharge from the armed services*
___	Broken home	___	Misconduct in school*
___	Chronic employment instability	___	Neurotic behavior*
✓	Chronic or acute familial discord*	___	Physical disability*
✓	Chronic school failure	✓	Placement in special education classes or school for exceptional children*
✓	Criminal behavior*		
___	Receipt of public assistance	___	Prostitution
___	Divorce or separation	___	Psychotic behavior*
___	Drug or alcohol abuse or addiction*	___	Receipt of psychotherapy*
___	Hospitalization for psychiatric disorder*	___	Receipt of social security benefits*
		✓	Sexual deviation*
		___	Other _____

* * *

E. Factors which might affect testing (suspected or established)

✓	Illiteracy	___	Medication effects
___	Impaired vision	___	Resentment of testing
___	Impaired hearing	___	Other (Describe)____
___	Fear of testing		

_____

* * *

_____

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:962] peaceful and law-abiding?

A Yes.

BY MR. SMITH:

Objection, Your Honor. Can I approach the bench?

BY THE COURT:

Make your objection.

BY MR. SMITH:

Objection to violation of constitutional rights, and the right of confrontation.

BY THE COURT:

Overrule the objection. You can answer the question.

Q Are you familiar with that reputation?

A Yes.

Q Is that reputation good or bad?

A Bad.

Q Are you familiar with his reputation in that community for being assaultive?

A Yes, I am.

Q Is that reputation good or bad?

A Bad.

Q Are you familiar with his reputation in that community for being dangerous?

A Yes, I am.

[963] Q Is that reputation good or bad?

A Bad.

Q Did you have personal contact with him during your years at Ellis One?

A Yes, I did.

Q Based upon your personal knowledge of him, your personal dealings with him, do you have an opinion, as to his character for being peaceful and law-abiding?

BY MR. SMITH:

Same objection, Your Honor. Further objection, improper under the Rules of Evidence.

BY THE COURT:

Objection is overruled.

Q You have an opinion?

A Yes, I do.

Q Is that opinion good or bad?

A Bad.

Q Do you have an opinion based upon your knowledge and dealings with him as to whether he is an assaultive person?

A Yes.

BY MR. SMITH:

Objection, Your Honor. Not proper subject for opinion evidence.

[964] BY THE COURT:

I think you have already asked that question on reputation.

BY MR. WEEKS:

I asked it on reputation. I am asking personal opinion now, same characteristic Your Honor.

BY THE COURT:

I am going to sustain his objection to that.

Q Did you have an opportunity while you were at Ellis One –

BY MR. SMITH:

May I request a jury instruction, Your Honor?

BY THE COURT:

Disregard the last question that Counsel asked this witness.

BY MR. SMITH:

And, I move for Mistrial?

BY THE COURT:

Motion for Mistrial is denied.

Q During your dealings with Mr. Penry at the Ellis One Unit, did you have an opportunity to talk with him?

[965] A Yes, I did.

Q Were you able to communicate with him?

A Yes, I was.

Q Was he able to communicate with you?

A Yes, he was.

Q Could he make himself understood to you?

A Yes, he could.

Q Did you have any problem making yourself understood to him?

A No, I didn't.

Q Was he able to understand the rules of the institution?

A Yes, he was.

Q Okay. In dealing with him, do you know whether he can read or write?

A Yes.

Q Can he?

A Yes, he can.

Q Did you see him read things and write things?

A Yes, I have.

Q And, was this on a pretty regular basis while you were there?

A Yes, it was.

Q Did you notice him change in his behavior, his ability to understand you and his ability to read [966] or write while he was at Ellis One?

A You want my opinion?

Q Yes, Sir.

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

You all approach the bench, just a minute.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. WEEKS:

I can probably ask based upon his behavior if he knows.

BY THE COURT:

Okay. Your objection?

BY MR. SMITH:

I didn't get what he said.

BY MR. WEEKS:

I said, I will ask him if he personally noticed a change in his behavior, personally observed it.

BY MR. SMITH:

He said, do you want my opinion, and you said yes. It is an objection to the [967] lay opinion, if he saw something.

BY THE COURT:

The objection is sustained, as to opinion. You can restate your question.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Based upon your observations of him, during your period there, did you see a change in his behavior concerning his ability to understand you and to read and write?

A Yes, I did.

Q When did that change come about?

A That change took place during the time when they started getting a hold in regard to him being mentally retarded.

Q And, what was the change that you saw in his behavior?

A At this particular point, I would say, that, he had a problem understanding, what I mean by understanding asfaras reading and writing, or even just having a verbal confrontation with him.

Q And, this was different than his behavior you observed in him in years previous?

A That's right.

Q. About how long ago was the change in terms of years?

[968] A I would have to say somewhere in '89.

Q Based upon your knowledge of him and dealings with him while you were at the Ellis One Unit, from 1986 to 1989, can you state in your opinion, whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

BY MR. SMITH:

Objection.

BY THE COURT:

Do you have any response to the objection?

BY MR. WEEKS:

Our response would be again, that this man has dwelt with him, opinion testimony, is allowed under the Rules of Evidence. I think this man has a long history of dealing with him.

BY MR. SMITH:

I think we need to approach.

BY THE COURT:

Approach the bench, just a minute, both of you.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:978] time, is that the most maximum security area?

A That is the most maximum secured area in TDC in the State.

Q And, how long were you on Ellis One, and had contact with Inmate Penry?

A Both times?

Q Yes, Sir.

A Probably a two-and a half years of total time. Like I said earlier, I was there, oh, from September until October, actually of '82, until May of '84, and then, I came back in '86 as a captain, and I was there a year.

Q When you were there in '84, what was your rank at that time?

A In '84?

Q Yes, Sir.

A I was just a sargeant.

Q And, did you have the responsibility over the area that he was housed in?

A Right.

Q And, did your responsibility include assigning inmates to rec groups?

A Right.

Q Did an inmate have privileges take away, modified?

A In my capacity, I wasn't the one that put them on [979] restriction, that was a whole different process, but, in my authority, I could alter or lift or modify the restriction that they were on, whether it be, recreation time privileges, commissary purchases, just things like that, and I did, I did have the responsibility of putting inmates in particular rec groups.

Q So, you were familiar with all the inmates in that area?

A That was my responsibility.

Q Did you have personal contact with Inmate Penry?

A Yes.

Q On many occasions?

A Yes.

Q Did you have conversations with him?

A Yes.

Q Did you have any trouble understanding him?

A No.

Q Did he appear to have any trouble understanding you?

A No.

Q If he didn't understand something, did he ask you about it?

A Oh, yes. If he didn't understand whatever it was we were talking about at the time, maybe [980] he doesn't understand the circumstances or the situation, he would ask, yes.

Q And, did you have dealings with him in terms of him obtaining privileges?

A Yes.

Q Did he barter with you?

A Well, yes, because like I said, he would approach me on numerous occasions about maybe he was on restriction for thirty days or sixty days, where he had lost his privileges, to recreate, and he may come to me and say, if I don't get in any trouble, for two weeks or three weeks or whatever, could I go to recreation, or could I go to the store, if I show you that I won't get in any trouble for a couple of weeks, and I will be good you know, that type of barter system, which happens, you know, on numerous times.

Q And, would he be able to conform his behavior and follow through on the bargain he made?

A Well, he would make an attempt at some point, but sometimes, he fell a little bit short of maybe the expected behavior.

Q And, are you very careful about who you recreate together?

A Yes. This was part of my duties to divide these [981] particular inmates up into groups of – different size

groups of them, may vary from six or eight or ten to twelve or fifteen, and that was my responsibility, to put them in recreation groups where they would be compatible with one another. Maybe there was such things considered as gang membership, or affiliation or just personality conflicts, and I would have to consider those facts on who is assigned to an inmate rec group.

Q Did you have any problem in getting Penry assigned to a rec group?

A Did I have a problem?

Q Yes.

A Well, yes, it was of concern at times, because at times, Penry would have disagreements or falling outs with certain people in this group, and, then, I would have to alter his group, because of his inability to function with these other inmates, at times.

Q Would you describe him as an aggressive or non-aggressive inmate?

A Well, he was an aggressive inmate, that is my opinion.

BY MR. SMITH:

Objection, Your Honor.

[982] BY THE COURT:

Overrule the objection.

Q Are you familiar with his reputation?

A Yes.

Q In the community which he lived at that time?

A At Ellis, yes, I was.

BY MR. SMITH:

Your Honor, can we have a running exception to this?

BY THE COURT:

Objection is overruled.

Q Are you familiar with his reputation for being peaceful and law-abiding?

A Yes.

Q Is that reputation good or bad?

A Bad.

Q Were you familiar with his reputation for being assaultive?

A Yes, I am.

Q Is that good or bad?

A Bad.

Q Are you familiar with his reputation for being a dangerous inmate?

A Yes, I am.

Q Is that good or bad?

[983] A Bad.

Q And, did you have an opinion based on your personal knowledge of John Penry, and your dealings of him over these years, and knowledge of him, as to

whether there is a probability that the Defendant would commit criminal acts of violence to constitute a continuing threat to society?

A Yes.

BY MR. SMITH:

Objection.

BY THE COURT:

Overruled.

Q What is that opinion?

A I believe he most definitely would.

Q Thank you, Sir.

BY MR. WEEKS:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q In that incident with Santana, Officer Selman, they were in separate cells, correct?

A Yes. The inmates were housed in separate cells.

Q And, Santana was able to step back and get physically out of reach from Penry on that occasion, right?

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:993] FRANK BRAGG

called as a witness by the State, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q State your name to the jury, please, Sir?

A Frank Bragg.

Q What is your occupation or profession, Mr. Bragg?

A I am a Deputy Sheriff of Trinity County.

Q How long have you served as a Deputy Sheriff over in Trinity County?

A About fifteen years.

Q Were you Deputy Sheriff over in Trinity County back in 1980?

A Yes, Sir, I was.

Q And, at that time, did you come to know a person by the name of Johnny Paul Penry?

A Yes, I did.

Q Do you see him seated here in the Courtroom today?

A Yes, Sir, I do.

Q Okay. And, could you point him out to the Judge and the jury, please?

A Right there between this lady and that guy.

[994] BY MR. PRICE:

Your Honor, may the record reflect that he has identified the Defendant?

BY THE COURT:

The record will reflect that the witness has identified the Defendant.

Q Mr. Bragg, in your capacity of a Deputy Sheriff there in Trinity County, did you have occasion to come in contact with the inmates that are kept there in the Trinity County Jail?

A Yes, Sir, I did.

Q Did you have occasion to come into contact with in the latter part of 1979 or early part of 1980, with Johnny Paul Penry, while he was there?

A Yes, Sir, I did.

Q Okay. Did you ever have occasion to carry on a conversation with him?

A Not extensive, but, Yes, Sir.

Q But, you would have occasion to talk to him from time to time?

A Yes, Sir.

Q Did you ever have any problem communicating with him?

A No, Sir, I didn't.

Q Did you ever have any problem with understanding [995] him?

A No, Sir, I didn't.

Q Did he ever appear to have any problem understanding you?

A No, Sir, he didn't.

Q Were you in Court in Groveton, Texas, on or about April 1, 1980, when Mr. Penry was also present in the court over there?

A Yes, Sir, I was.

Q And, specifically, were you present when the Judge, in a judicial proceeding over there read a verdict in which the jury had just returned concerning Mr. Penry?

A Yes, Sir, I was.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Okay. You can approach the bench.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, this is, I now understand the purposes of this witness is to try to get before the jury in an indirect way, the

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:1003] Justice?

A Approximately eight years.

Q Where did you start your employment with them, what unit?

A Ellis One Unit.

Q What year was that?

A 1982.

Q And, how long did you stay at the Ellis One Unit?

A Until August, 1989.

Q What was your rank when you started?

A I was a Correctional Officer One.

Q What was your rank when you left?

A Lieutenant.

Q During the time that you were on the Ellis One Unit, did you come to know an inmate by the name of Johnny Paul Penry?

A Yes, I did.

Q If he is in the Courtroom, would you point him out and describe how he is dressed?

A Yes, Sir. Looks like he has on a light blue shirt and dark blue pants, and sitting at that table.

BY MR. WEEKS:

May the record reflect that he has identified the Defendant?

BY THE COURT:

[1004] The record will reflect that he has identified the Defendant.

Q In the period of time that you were at the Ellis One Unit, did you have few or many occasions to come into contact with Inmate Penry?

A Many occasions.

Q And, did you have conversations with him?

A Yes, Sir, I did.

Q Did you have any trouble understanding him?

A No, Sir.

Q Did he have any trouble understanding you?

A No, Sir.

Q You know whether he can read or write?

A I have seen him write and I have seen that he has books in his cell, and I have seen him looking at books.

Q Does he know the difference between right and wrong?

A Yes, Sir.

BY MR. SMITH:

May we approach on that, Your Honor?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING [1005] CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, there is no issue, there is no claim here that he didn't know the difference between right and wrong that needs to go to the jury, dating back to it, or a difference in right or wrong, and retardation in this, between right and wrong, violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, Texas Constitution and the Code of Criminal Procedure.

BY THE COURT:

Any response?

BY MR. WEEKS:

Our response would be that I think it is very relevant whether he knew the difference between right and wrong, and goes to understanding the charges against him, and goes to a claim of mental retardation.

BY THE COURT:

I am going to overrule the objection. You can ask the question.

[1006] BY MR. WEEKS:

I think it has been asked and answered, Your Honor.

BY THE COURT:

Okay.

(END OF CONVERSATION HELD AT THE BENCH.)

Q How long were you a CO3, basic corrections officer, there at Ellis One?

A From 1982 to 1985.

Q What rank did you obtain in 1985?

A Sargeant Corrections Officer.

Q And, how long were you a sargeant?

A Two and a half years.

Q As sargeant, did you have a supervisor's position, in the area in which Inmate Penry was housed?

A Yes, Sir, I was the sargeant in the maximum security cell block area.

Q And, as a sargeant, were you responsible if there were problems with inmates?

A Yes Sir, any time an officer would have a problem with an inmate, he would bring it to my attention and I would handle it.

Q And, did you have occasion to come into contact with Inmate Penry, on numerous occasions during that time?

[1007] A Yes, Sir.

Q And, are you familiar with his reputation in the community in which he lived there at the Ellis One Unit?

A Yes, Sir.

Q And, are you familiar with his reputation for being peaceful and law-abiding?

A Yes, Sir.

Q Is that reputation good or bad?

A Bad.

BY MR. SMITH:

Make the objection that we made previously, re-urge it Your Honor.

BY THE COURT:

Objection overruled.

Q And, you are familiar with his reputation for being peaceful and law-abiding?

A Yes, Sir.

Q What is that reputation, good or bad?

A Bad.

Q Are you familiar with his reputation in that community for being assaultive?

A Yes, Sir.

Q Is that reputation good or bad?

A Reputation is correct, he is assaultive.

[1008] Q And, drawing your attention, are you familiar with his reputation for being dangerous?

A Yes, Sir.

Q Is that reputation good or bad?

A It is correct, it is he is dangerous.

Q Would that reputation be bad?

A Yes, Sir.

Q Now, based upon your extensive dealings with him over the years, you were at the Ellis One Unit, that would be what, seven or eight years?

A Yes, Sir.

Q And, your knowledge of Johnny Paul Penry, do you have an opinion, that there is a probability that Johnny Penry would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes, I do.

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Objection overruled.

BY MR. SMITH:

Can I have a running exception on this?

BY THE COURT:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:1048] CLAYTON MALONE

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Good afternoon. I am sorry that we caused you to be dragged here, but, you understand that we are doing our job. You are an attorney, correct?

A Yes, Sir.

Q And, you were appointed by the Court to represent Johnny Penry in a rape case in 1977?

A Yes, Sir.

Q Do you have an independent recollection today of the State on which you were appointed, Sir?

A Yes, Sir. I was appointed the first time, I believe in April of '77.

Q And, is that, of your independent recollection, you understand the words independent recollection?

A Well, you maybe had better define that.

Q Okay. If I asked you the same question last week, at this time, would you have known it was April of '77?

A I have, since receiving the subpoena, I have gone [1049] to the Courthouse and looked at the official records to be certain of my memory, and it didn't disagree.

Q Okay. And, I am going to ask the reporter to mark a document that I am handing as Exhibit One for the purposes of this hearing.

REPORTER'S NOTE: (WHEREUPON EVIDENCIARY HEARING DEFENDANT'S EXHIBIT NUMBER ONE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I'm sorry I don't have copies, but, I didn't know there was going to be a hearing when I came to Court today.

BY MR. SMITH:

Do you have that document?

BY MR. PRICE:

I got it.

Q Is that the record that you looked at, Mr. Malone?

A Yes, Sir, in addition to another case. This is part of the records that I looked at.

Q You looked at a different record, too?

A Yes, Sir.

Q Can you describe that other record, please?

A There were in that particular matter, there were [1050] two indictments, an earlier one, an earlier indictment, and that particular indictment.

Q The one that I just showed you is Cause Number 9886. There was also a 9885?

A Yes, Sir.

Q And, you say that you looked at the document, 9885, in the 9885 file that you were appointed in April?

A Yes, Sir.

Q Do you have that file with you today?

A No, Sir, I do not.

BY MR. SMITH:

May I ask, Your Honor, if the District Attorney has such document, that he would show it to me?

BY THE COURT:

Yes, Sir.

BY MR. PRICE:

(Showing to Mr. Smith).

BY MR. SMITH:

I am going to ask the reporter to mark this collection of documents that I just borrowed from the District Attorney as Defendant's Exhibit Two for the purposes of this hearing.

[1051] REPORTER'S NOTE: (WHEREUPON EVIDENCIARY HEARING DEFENDANT'S EXHIBIT NUMBER TWO WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Is Defendant's Two the document that you were just talking about, Mr. Malone, some part of Defendant's Exhibit Two?

A Yes, Sir.

Q Can you show me the part where it showed you were appointed in April?

A I don't believe this is the complete file on it. This doesn't reflect it.

BY MR. SMITH:

Joe, do you have something that does?

BY MR. PRICE:

Reflects what?

BY MR. SMITH:

Something from the file, 9885, that reflects Mr. Malone was appointed in April.

BY MR. PRICE:

I didn't cover it to you for that purpose.

BY MR. SMITH:

Well, I just asked the witness. I am giving Mr. Price back Exhibit Number Two.

[1052] Q You are saying now, lets get it straight, Mr. Malone. You are aware there were two different files, 9886 and 9885, is that correct?

A Yes, Sir.

Q And, you are saying that there is something in the earlier file that shows the date of the appointment in April?

A I was appointed in April, because there is something else in the file that shows a medical examination or psychiatric examination of Mr. Penry. If you have the entire file, I will take a look at it and show you what I looked at.

BY MR. PRICE:

May I offer –

BY MR. SMITH:

Why doesn't Mr. Price do that. And, can I look over his shoulder while he is doing that?

BY MR. PRICE:

I would like to have both of these marked, 9885. Are you going to offer that as Defendant's Exhibit Number Two?

BY MR. SMITH:

Not offering it yet, anyway.

BY MR. PRICE:

[1053] Why don't you mark these State's Exhibit One and Two and I will offer them. They are certified copies of all of the documents in those two case numbers.

REPORTER'S NOTE: (WHEREUPON EVIDENCIARY STATE'S EXHIBITS NUMBERS ONE AND TWO WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. PRICE:

Judge, for the purposes of the record we would offer into evidence State's Exhibit Number One, for the purpose of this hearing, which is the certified copy of the documents contained in Cause Number 9885, State of Texas vs. Johnny Paul Penry in the District Court of Polk County, Texas; and State's Exhibit Number Two, which is a certified copy of all of the documents in Cause Number 9886, State of Texas vs. Johnny Paul Penry, in the District Court of Polk County, Texas.

BY MR. SMITH:

Purerly as a matter of form, Judge, I am happy to use these with the witness [1054] now. I think we should hold this over until the State's case. I was just questioning the witness.

BY MR. PRICE:

I will offer them later.

BY MR. SMITH

I do want to pause and look through them carefully and I will do that, I am sure they are probably going in.

Q Take a look at State's Exhibit Number Two, Mr. Malone and see if you can find the document that you are talking about, that shows that you were appointed in April.

A Yes, Sir, the docket sheet reflects that entry was made that I was appointed in April.

Q Show me where that is?

A (Witness indicating).

Q You are quite right, because I pointed to the wrong exhibit, State's Exhibit Two, is a file of 9886, isn't it?

A Yes, Sir.

Q And, what you just pointed out to me is a copy of a page, or a copy of the Defendant's One, which I already showed you, right?

A Yes, Sir.

[1055] Q Take a look at State One, which is also Defendant's Two. Why do we do this to each other? And, see if you can find anything in there that shows that you were appointed in April?

A No, Sir, I don't see a docket entry.

Q Okay. The point I am just trying to make Mr. Malone, if you disagree with me, say so. Is that two indictments and there is nothing in the file of the first one that shows you being appointed at all?

A No, Sir, but that –

Q Okay. I'm not through. I'm not through. I don't want to get you to say any more. Asfaras the file of the first of those two indictments, no record that you were ever appointed, true?

A That's true.

Q Okay. And, what date was the second indictment filed, Sir?

A Sir?

Q Look at the records in front of you and tell me when the second indictment was filed. I think the first page of Exhibit Two will tell you.

A The second indictment was returned on May 5th, '77.

Q Okay. So, you say you were appointed, the first [1056] indictment was still pending before the second indictment, right?

A Yes, Sir.

Q Nothing in the first indictment in the file that shows that?

A No, Sir.

Q Okay. Now, look at the document that does show your appointment, which is the first page of – well, I won't fool around, the first page of State's Two, you agree with me, that document was originally created sometime around May 5, '77, or later, because that was when the indictment was filed, right?

A Yes, Sir. That is when the second indictment was filed, on May 5, 1977.

Q And, there are a lot of – not a lot, but, there are three entries on that docket, right?

A Yes, Sir.

Q And, the dates?

A Yes, Sir.

Q And, what is the date of the first one?

A The date of the first one is July 14th, '77.

Q Okay. And, do you know from your experience, of the courts around here, whether on a docket you normally right down the first entry on the [1057] top and then the second entry after, and the third entry after that?

A Judge Earnest Coker, Sr., is the one who was the judge in the matter, and apparently, he was combining both cases on his docket entry. I would have no other explanation for it.

Q Well, just so His Honor understands the point that I am making, before you try to explain it, is it unusual for an April entry to come after a July entry?

A Oh, Yes, Sir.

Q This time the entry that seems to say 4/14/77 comes after the entry that says, 7/14/77, right?

A Yes, Sir.

Q And, one possible explanation of that is first, that it was a mistake and the second entry, 7/14/77, did that occur to you?

A Definitely occurred to me, but, it definitely is not.

Q How do you know that?

A Because I can tell you that by looking at wherever Dr. Peebles' report is, I can get around to tying it down exactly.

Q Good, go ahead.

BY THE COURT:

[1058] Mr. Smith what was your question to the witness, the last question?

BY MR. SMITH:

Well, he has volunteered, Your Honor, to find Dr. Peebles' report and tie it down, to prove where he was appointed.

A Dr. Peebles' report is reflected to have been done on May 19, 1977.

Q Yes, Sir. Is there something in there that tells you that you were appointed in April?

A Yes, Sir, because to this effect, that I had requested it, with an oral motion to the Court that this be done.

Q You remembering asking for a medical exam?

A Yes, Sir.

Q You are remembering that today, something that happened thirteen years ago, right?

A Yes, Sir, I have reviewed and looked at the doctor's report.

Q Uh-huh. Looking at any document today, that shows that you requested this?

A No, it was a verbal motion to the court.

Q You remember that verbal motion right now?

A Yes, Sir.

[1059] Q You say you reviewed the doctor's report. Did you review the second page of it? I am not going to make you read it all now, if you don't want to, Mr. Malone, but, referring to the next to the last paragraph on that page, you see that there?

A Repeat your question. I'm a little hard of hearing and I don't hear because of the distance. I don't hear to well.

BY MR. SMITH:

Shall I stand closer, Judge?

BY THE COURT:

That's fine with me.

A Sure would be with me.

Q Okay. Mr. Malone, coming through?

A Yes, Sir.

Q Look at the next to the last paragraph on Page 2 of Dr. Peebles' report. Got it?

A Yes, Sir.

Q What does it say?

A You talking about the last paragraph?

Q Next to the last.

A Next to the last. Alright.

Q What does it say, Sir?

A He believes this was in February, apparently that –

[1060] Q Read it first, then, you can explain.

A Of what occurred, but, he said he hadn't seen an attorney yet.

Q So, Johnny Penry told the doctor that he hadn't seen an attorney?

A Yes, Sir.

Q You say that wasn't true? Do you say that was not true?

A It wasn't true, if he is talking about before April 19th.

Q What is the date of the doctor's report?

A Doctor's report is May 19th.

Q And, does it show in there when he talked to Johnny Penry?

A I don't – somewhere around – No, Sir, I don't believe it does.

Q Do you know any reason for Johnny Penry to lie and to tell the doctor that he hadn't seen an attorney?

A Well, I wouldn't have any reason to know why Johnny Penry would do anything.

Q But, the report had to be written after you made the oral motion didn't it?

A Yes, Sir.

Q And, Dr. Peebles had to see him after you made [1061] your motion, didn't he?

A That would be my opinion, that he saw him after I made the motion, because up until that point, nothing had been done.

Q So, if Johnny Penry told Dr. Peebles when he saw him that he hadn't seen an attorney, that just wasn't true, right?

A No, Sir, it wouldn't be true.

Q Looking back, at State Two, where Judge Coker wrote what looks like 4/14/77, you are appointed?

A Yes, Sir.

Q You say that Judge Coker must have been combining something from an earlier file?

A That would be my assumption. Can't say for certain that occurred, but, that would be my assumption because I was appointed on the 9885 Case first.

Q And, why would Judge Coker do that on April 14th date?

A That was, other than, he may have made the notation to remind himself. I have no idea where he could have gotten it.

Q There is a place where the Judge normally makes a notation to remind himself when he has appointed Counsel, isn't there?

[1062] A Not necessarily with Judge Ernest Coker.

Q But, isn't it a pretty good idea when a Judge appoints Counsel, for him to note it in the docket?

A Most judges do that, Yes, Sir.

Q And, there is nothing in the docket of 9885, 9985 doesn't say anything about appointing you, does it?

A No, Sir, it sure doesn't.

Q Well, I am going to show you a page in State's Exhibit Two and let's see, I have to waste a minute counting. The eighth page from the back. I didn't want to count it from the back. The eighth page from the back. You see that?

A Yes, Sir.

Q And, you see Number Two there?

A Yes, Sir.

Q That is a Waiver of Preparation Time by Court Appointed Counsel, right?

A Yes, Sir.

Q And, you signed that on July – on the date in July, '77, right?

A That's true.

Q And, Johnny Penry signed it too?

[1063] A Yes, Sir.

Q You were waiving the ten days aloud for preparation trial in July of 1977, right?

A Yes, Sir.

BY MR. SMITH:

Now, Your Honor, I will agree at this point, what he states, State Exhibit Number One and Two into evidence.

BY THE COURT:

State's Exhibits One and Two are admitted without objection by agreement, for this hearing only.

Q Let me – well, I guess I am not quite through with Exhibit Two. Mr. Malone, can you find this Exhibit Two – no, that's improper.

A That's the one that you had.

Q That's the one that I had. There is a certificate of service. Is that in that file or not?

A You mean for my paycheck?

Q Yep. Let me – let me just ask one of these. Let me just ask the reporter to mark these that says Exhibit Three for this hearing a document that I am handing to him now.

REPORTER'S NOTE: (WHEREUPON EVIDENCIARY HEARING DEFENDANT'S EXHIBIT THREE WAS [1064] MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Let me show you Defendant's Exhibit Three for the hearing. Is that where you put in your paycheck?

A Yes, Sir.

Q And, that is your signature?

A Yes, Sir.

Q And, you put – you got a hundred and fifty dollars right?

A Yes, Sir.

Q And, fifty dollars for what, court today, right?

A Yes, Sir.

Q Which day was that?

A That was the entry of the plea.

Q Make the oral motion for free?

A You don't understand Judge Coker. He paid for one day on a plea.

Q And, you got a hundred bucks for investigation, right?

A Yes, Sir.

Q What did you do with your hundred dollars?

A Well, I believe what I did was –

Q Maybe hold on. Okay. I'm sorry, go ahead.

A I believe that would have covered the motions and discussions with Mr. Penry.

[1065] Q Talk to any witnesses?

A Did I talk to any witnesses?

Q Yeah.

A Yes, Sir, I did.

Q What was their name?

A I don't recall.

Q What was your hourly rate at that time, back then?

A In 1977, it was probably fifty buck an hour.

Q Is the name Louis Milner familiar to you?

A Yes, Sir, he was the Deputy Sheriff that investigated the incident.

Q You interviewed him?

A I talked with Mr. Milner, Yes, Sir.

Q On this case?

A I am going to say, Yes, Sir, I talked to him about this case.

Q When did you do that?

A Prior to the entry of the plea.

Q How far prior?

A Don't recall that.

Q What did you say to him, what did he say to you?

A I don't recall that. I just ordinarly, the peace officers I knew real well, and they would let me look at their files, and I did.

Q You can't actually recite, here it is thirteen [1066] years ago, conversation with Mr. Milner, do you?

A No, Sir, No, Sir.

Q What about the name Sherlene Brown, is that familiar to you?

A Oh, Yes, Sir. She is the Sheriff's secretary.

Q Ever talk to her about the couch case or the Penry Case?

A No, Sir, I believe she notarized mayabe some of the statements.

BY MR. SMITH:

Your Honor, can I approach?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I have to go into that man's prior suspension, but, I am not going to make a motion to Close the Courtroom.

BY MR. PRICE:

I am going to object to it, unless they have got some proof that his suspension and I have got a case by the Court of Criminal Appeals directly on point that says it is not relevant unless his suspension or whatever had to do with this case, and I don't think Mr. Malone –

BY MR. SMITH:

I am not saying that it had to do with this, but, I do claim that it was based on in-attention, repeat in-attention, to clients at the very time that we are talking about.

BY MR. PRICE:

You would have to show some relevance, to this case, and I have got the case to offer to Mr. Smith, and I don't want to embarrass him unnecessarily.

BY THE COURT:

I am going to not allow the offer at this time.

BY MR. SMITH:

Just forthe record, I would have shown that Mr. Malone had a drinking problem in 1977, and the problem led to in-attention to his cases, and I would ask that, including this one, I don't know what he did, but, it related to being suspended from practice as a [1068] result of inconsistence, one of which was that the Court of Civil Appeals noted that a matter that pending from February, 1974, Court of Criminal Appeals, and another matter pending in February of '74, to May of '77, the client said that he saw the attorney only twice.

BY MR. PRICE:

As long as it is clear on the record, I want Counsel to verify this, that first of all, do you not have anything that indicates his suspension in any way shape or form or fashion, had anything to do with his performance in the case of the State vs. Johnny Paul Penry, State's Exhibits One and Two?

BY MR. SMITH:

I am not going to stipulate to all of that, but, I do not claim that there is any mention of the Penry Case in any of the proceedings.

BY THE COURT:

Alright. You can proceed.

(END OF CONVERSATION HELD AT THE BENCH.)

BY MR. SMITH:

[1069] I will pass the witness.

BY THE COURT:

Mr. Price, do you have any questions of Mr. Malone?,

BY MR. PRICE:

Just a couple of questions, Your Honor.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mr. Malone, the fact that your hourly rate may have been fifty dollars an hour, in 1977, whatever it was, did Judge Coker pay on the basis of whatever your hourly rate was?

A No, Sir. The attorney asked Judge Coker what he would pay if he had a particular case, and the Judge would state from the bench.

Q Pretty well tell you how much how much he was going to pay?

A Didn't make any difference if I spent two months on the case, it still would have been this figure.

Q I want to show you, – is it your testimony here today that you were, irregardless of what order the docket sheet entry may have been in, that you were appointed by Judge Coker for some [1070] time in April, 1977, to represent Johnny Paul Penry, is that your testimony?

A Yes, Sir.

Q And, is it also your testimony that you were first appointed to represent him in 9885?

A That's true.

Q And, that, carried over into 9886, is that correct?

A That's true.

Q Did you represent Johnny Paul Penry when he entered a plea of guilty in 9886 on, I believe July 25, 1977, is that correct?

A Yes, Sir, that's correct.

Q Did you represent him at that proceeding?

A Yes, Sir.

Q You had previously made a verbal motion to the Court to have the Defendant examined for competency and sanity, is that correct?

A That's true.

Q And, Judge Coker entered an order, I believe on May 5, 1977, is that correct?

A Yes, Sir.

Q That is part of State's Exhibit Number Two, is that correct?

A That's correct.

[1071] Q And, he was subsequently examined by Dr. Felix Peebles, at least the report is dated May 19th, 1977, is that correct?

A That's correct.

Q And, in that report, Dr. Peebles, found him to be competent to stand trial and sane at the time of the commission of the offense under Texas law, did he not?

A Yes, Sir.

Q With respect to the other plea papers contained in Cause Number 9886, which is now State's Exhibit Number Two, I want to direct your attention first of all to the document entitled, Stipulation of Evidence, which appears to be signed by Johnny Paul Penry and sworn to before the District Clerk of Polk County. Did Mr. Penry sign this stipulation of evidence?

A Yes, Sir, he signed the Stipulation of Evidence.

Q Did you go over it with him and advise him of what that document contained, what its contents were as well as what the legal effect of that document was before he signed it?

A Yes, Sir. I always tell the Defendants when I am reading that document to them, that this is [1072] a judicial confession.

Q Did he understand what that document was before he signed it, in your opinion?

A In my opinion, he understood it.

BY MR. SMITH:

Objection, Your Honor, beyond the scope of the Hearing.

BY THE COURT:

Objection is overruled.

Q I will show you a document that has got various signatures on it. The first is a waiver of the jury that purportedly is executed by you, Jerry Winfree and Johnny Paul Penry. Did you explain to Mr. Penry that he had a right to a jury trial?

A Yes, Sir, I explained that he had a right to a jury trial.

Q Alright. Who is Jerry Winfree?

A Jerry Winfree was Assistant District Attorney out of Conroe that tried the case.

Q Also, a Waiver of Preparation Time by Court appointed counsel, that Defense Counsel has just asked you about waiting ten days to prepare for trial. Your testimony had been that you had been appointed more than ten days prior to [1073] that?

A Yes, Sir, and I complete that in every plea that I take, even thoug, I may have been appointed two or three months, I still waive it.

Q The fact that you and Mr. Penry executed that Paragraph Two on that document, does not necessarily mean that you had just only been appointed in less than ten days prior, does it?

A No, Sir.

Q In fact, if that was the case, this plea was entered July 25th, which would have meant that you would have

to have been appointed sometime after July 15th, wouldn't it?

A That's true.

Q It shows it clearly that he was arraigned on July 14th, which was some eleven days prior to the time, is that correct?

A Yes, Sir.

Q Is it your testimony that it was not necessary to execute that particular waiver?

A That would be true.

Q Okay. The other signature here is on the waiver of ten days by a Motion for New Trial, and Mr. Penry signed that, and did you explain his rights in connection with that also?

[1074] A. Yes, Sir.

Q There is an admonishment, the next page contains what is entitled Admonishment, and it appears to have been signed by Judge Coker and also signed by you and Mr. Penry at the bottom. First of all, prior to the plea, did you go over the matters contained in this Admonishment with the Defendant?

A Yes, Sir.

Q And, during the plea itself, did Judge Coker, likewise admonish him to some five items contained on that document, there?

A Yes, Sir.

Q And were you satisfied that Mr. Penry understood those various admonishments, there specifically

dealing with, first of all, whether or not his plea is – "If your plea of guilty was prompted or influenced by any consideration, persuasion or illusion for hope or pardon, are you satisfied that he understood that?

A He understood that. Yes, Sir.

Q Did he understand the range of punishment being five to ninety-nine years or life?

A Yes, Sir.

Q The judgment is contained on Page – well, it is [1075] a later part of it here, but, ir any respect, did the Judge enter a judgment or sentence at that time, at least from the bench?

A Yes, Sir.

Q These are certified copies – what was the sentence?

A The sentence was five years for rape.

Q Okay. Was that a two count indictment?

A Yes, Sir, it was a two count indictment.

Q Okay. Would you look at the indictment in Cause No. 9886?

A Okay.

Q Did he plea guilty to the first count of that indictment?

A First count of the indictment, that is after it had been reduced to rape.

Q What happened with respect to the second count?

A The second count of the indictment was dismissed.

Q Was that part of the plea bargain?

A Yes, Sir.

Q Was that done on the record in Court?

A That would be in the records of the Court, Yes, Sir.

Q I mean, if it was done on the record, asfaras the Court reporter was concerned?

[1076] A Yes, Sir. The Court reporter.

Q Normally, in a plea, and in this particular case, was there a Court reporter there that took that plea?

A Yes, Sir.

Q Do you see Johnny Penry seated here in the Courtroom today?

A Yes, Sir.

Q Could you point him out to the Judge?

A Sitting by the lady there.

Q Is that the same Johnny Penry, the Defendant, in these two case numbers that you have been testifying to?

A. Yes, Sir.

BY MR. PRICE:

I pass the witness.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q You told Mr. Price that you explained a lot of things to Mr. Penry around the time that he pled?

A Yes, Sir.

Q You actually remember giving those specific explanations specifically to this man at that time?

A Yes, Sir, because there was a lot of conversation [1077] between myself and Mr. Penry and also his uncle.

Q You are telling me that you remember today, July 11th, 1990, that back in July of 1977 you explained to Johnny Penry what a right to a jury trial was?

A Yes, Sir.

Q What did you say?

A I give my ordinary standard spill that I give to every person.

Q I know. I want you to tell me what you exactly remember saying to this man?

A After a considerable amount of consideration on the offer made on the plea bargain, and after that, he agreed to accept it. I then took the plea papers that are now here and went over each item on the page starting with the waiver, you have the right to a jury trial. If you sign these papers, you waive the right to a jury trial, and right on down the line.

Q Just to make it clear, I take it, your lawyer said something, I think he understands the difference. Are you

saying that you actually have a present recollection of saying that to Mr. Penry, or are you assuming it because it was a usual practice?

[1078] A I am not assuming anything.

Q You are saying that these are your present recollections of those conversations with Mr. Penry, right?

A Yes, Sir.

Q And, you also have the present recollection of the Judge saying that the second count is dismissed, right?

A Mr. Winfree made the motion that it be dismissed.

Q And, that is your present recollection, you remember those words being said in the Courtroom, right?

A Yes, Sir. The record will prove it, whatever. There was a record made.

Q Where is the record that proves it?

A Wherever the Court's records – or the court reporter records would be, I have no idea.

Q Are they in this room?

A I don't imagine they are.

Q What was the second count of the indictment, the one that eventually got dismissed? Was that part of the reason that you agreed to the plea?

A No, Sir.

Q In fact, the witnesses at that time weren't even there that day, were they?

[1079] A No, Sir.

BY MR. SMITH:

I will pass the witness, Your Honor.

BY THE COURT:

Does the State have any other questions of Mr. Malone?

RECROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q After the date of that plea, Mr. Malone, did you represent Johnny Paul Penry in that case or either one of those cases?

A No, Sir.

Q That is the end of it?

A. That was the end of the matter.

BY MR. PRICE:

No further questions, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q One of the things that you accomplished from Mr. Penry was getting that second count dismissed right, Mr. Malone?

A No, Sir, I wouldn't say that was an accomplishment.

I would say that was part of the transaction of the plea bargain.

Q Wasn't it part of your job to make sure it got [1080] done?

A Yes, Sir.

Q Was it also part of your job to make sure that it got done in the Court's file?

A I didn't consider it a part of my job to be the court reporter, but, I can say this, when I – it was my job to get the best resolution of the charges that I could get Mr. Penry, and I think I did.

Q Try to address the question that I ask, Mr. Malone.

A Alright.

Q Was it part of your job to see that the dismissal got noted on the Court's file?

A In my opinion, the dismissal came when the judgment was entered.

Q Let me ask the question one more time, Sir. See if you can answer it yes or no. Wasn't it part of your job to see that the dismissal got noted on the Court's file?

A I would say that it would be part of my job, but, I don't read shorthand notes.

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

[1081] Okay. You can step-down, Mr. Malone. Thank you.

Who is your next witness, Mr. Smith?

BY MR. SMITH:

Louis Milner.

BY THE COURT:

Call Mr. Louis Milner.

REPORTER'S NOTE: (WHEREUPON THE WITNESS, LOUIS MILNER WAS DULY SWORN IN BY THE CLERK.)

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:1156] If I did this, do I have to stand or get one of the others repeated?

BY THE COURT:

On both of them, Yes, Sir.

BY MR. SMITH:

I still make the objection.

BY THE COURT:

Objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

Q You do have an opinion as to whether the Defendant, Johnny Penry, is peaceful and law abiding?

A Yes, Sir, I do.

Q Is that opinion good or bad?

A It is bad.

Q And, do you have an opinion as to whether the Defendant, Johnny Penry is assaultive?

A Yes, Sir, I do.

Q And, what is that opinion?

A I feel that he is assaultive.

Q Based upon your knowledge of him, your dealings with him, over that period of five years, do you have an opinion as to whether Johnny Penry is a dangerous individual?

A Yes, Sir, I do.

[1157] Q And, what is that opinion?

A I feel that he is dangerous.

Q Do you have occasion to talk with him on many occasions?

A Yes, Sir, I did.

Q Could you understand him in those conversations?

A Yes, Sir, I could understand him.

Q Could he understand you?

A He appeared to understand me at the time that I spoke.

Q Did he respond appropriately?

A Yes, Sir, he did.

Q And, you know whether he could read or write?

A I believe he can, yes.

Q And, he was housed in the maximum security area?

A He was housed in the most maximum security area in the prison.

Q Based upon your knowledge of him, do you have an opinion as to whether there is a probability that Johnny Penry would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes, Sir, I do.

BY MR. SMITH:

We already made the objection, Your

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[48:1079] be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Okay. If you will just have a seat right there and after you get seated that mic will move around. Sounds like you don't talk very loud, so, you need to pull it up and talk into it so everyone on the jury can hear you. Alright, ma'am.

BELINDA ANDERSON

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Sally Belinda Anderson.

Q Where do you live?

A Dickinson, Texas.

Q How old are you?

A I am thirty-one.

Q Are you married?

A Yes.

Q Do you know Johnny Paul Penry?

[1080] A Yes.

Q And, what is your relationship with him?

A He is my brother.

Q Are you older or younger?

A I am younger.

Q By how much?

A Two years.

Q Did you have another brother and sister?

A Yes.

Q Now, you have been convicted of a crime, is that right?

A Yes.

Q What was that?

A Burglary of a habitation.

Q Okay. And, in what county was that?

A It was Eighty-Two, Eighty or Eighty-Two.

Q And, how old were you?

A Probably about twenty, maybe.

Q Lets talk about Johnny and his growing up a little bit. Did Johnny go to school?

A Yes.

Q Do you know what grade he attended?

A First grade.

Q Did he attend school after that?

A Yes.

[1081] Q Well, lets go back to the first grade. Did he complete the first grade?

A No, he didn't.

Q He did not?

A He did not.

Q And, you said that thereafter, he went to school again?

A Yes.

Q And, where was that?

A Mexia State.

Q What is Mexia State?

A It is a school for the mentally retarded.

Q And, how old was Johnny there at Mexia?

A Close to fifteen, not quite sure on that, but, he was there a couple of years at least, the best I can remember.

Q When you say twelve or fifteen, that was about how old he was?

A Yes.

Q Now, did you and your brothers and sister attend school regularly?

A Repeat that, please.

Q You and your brothers and sisters all went to school?

A Oh, yes.

[1082] Q In the normal course, first grade and on?

A Yes.

Q Now, when Johnny was a little kid, did he learn to read and write?

A No.

Q And, when he got back from Mexia, could he read and write?

A He could spell his name, and I think he could spell cat, and maybe dog.

Q Did you work with him to try to get him to read and write?

A Yes, we all did.

Q Who was that?

A That was my dad, my aunt and us other kids.

Q Do you now know that he can read and write at a relatively low level?

A Yes, from what you told me, yes.

Q Do you think Johnny is retarded?

A Yes.

Q What makes you think that?

A It is hard for him to comprehend things. They don't come easy with him. You have to sit there and talk to him for a while before they actually begin to sink in.

Q Did Johnny spend lots of periods of time locked in [1083] a room?

A Yes.

Q And, where were you living when that happened?

A We were living on Brew Street in Baycliff.

Q That was before he went to Mexia?

A Yes.

Q How long was he locked in this room?

A From eight hours on up.

Q And, who would lock him in there?

A My mother.

Q And, did you ever let him out?

A During the day while she was at work, yes.

Q I couldn't understand.

A During the day while she was at work, when she went to work, we did let him out.

Q Were you afraid, back then what would happen to you and/or Johnny if she found out that you had let him out?

A Several times she come home early and we got in trouble, Johnny got beat.

Q Would the family have supper together?

A When Daddy was home, we all ate together.

Q Did Johnny participate?

A We all ate together when Daddy was home.

Q How often was Daddy home?

[1084] A Maybe twice a week at supper time. Lots of times he was late coming home.

Q Did he work long hours?

A Yes, he did. He was holding down many jobs, once.

Q And, when he was not there, what would Johnny do about supper?

A He would do without if he wasn't good.

Q How long would he go without supper?

A About five days out of the week.

Q Is there a bathroom in that room?

A No, there wasn't.

Q Could he get to a bathroom?

A No.

Q What would he do about going to the bathroom?

A He would go to the attic and take a poop.

Q But, he could get to the attic from his room?

A Yes, the attic entrance.

Q Did the room smell?

A Yes, it did.

Q From what?

A From urine and bowels.

Q Is your father still alive?

A Yes.

Q What is the state of his health?

A Well, he has had another stroke, and they found [1085] some kind of tumor or something on his brain. They don't know if it is malignant or not, still running test.

Q Is your mother still alive?

A No.

Q Now, when you had let Johnny out of the room, what sort of things would he enjoy doing?

A We would sit out underneath the fig trees and play cards with him and try to have fun with him, you know.

Q Was your mother affectionate with Johnny?

A No.

Q Ever see her hug him?

A Twice.

Q And, that's it, twice in over the years that you were growing up?

A Yes, ma'am.

Q Did your mother call Johnny names?

A Yes.

Q What words would she use?

A Well, the main thing, was "Blackie Carbon."

Q Why did she use that word?

A She got it off of a commercial, but, she would get hateful like, she was ashamed of him, like she didn't love him or something, you know.

[1086] Q She called him other names?

A Yes, she called him short little bastard, and mother-fucker and all kinds of filthy words.

Q What would the tone of her voice be?

A Hateful.

Q Did you see your mother beat Johnny?

A Yes, I did.

Q How much would she beat him?

A After a while, it was practically an everyday affair.

Q And, was it normal discipline or just a beating?

A It was a beating. Belt buckles, belts, it didn't matter, brooms, toy brooms, sticks and mop sticks, and anything she could lay her hands on, or her feet, stomp on him and stuff, and didn't matter to her.

Q Did she ever threaten to blind him?

A Yes.

Q What would she do?

A He would look at her wrong or something and she would just threaten to scratch his little eyeballs out.

Q Would she do it?

A No, we would stop her. She would put her nails on his face and stuff, and we would stop her.

[1087] Q Did your mother use punishment on him while kneeling?

A That was about an everyday affair, too.

Q How long was Johnny forced to kneel?

A Sometimes, two hours, four hours, five hours. Always happened while Daddy was at work.

Q What would trigger your mother's beatings of Johnny?

A Pardon me?

Q What would trigger them, the beatings?

A Anything. She could be drinking, could look at her wrong and didn't matter, he would say I love you, Mommy, Anything.

Q You mentioned a time that your mother picked him up?

A Yes.

Q Beat him with a mop that your aunt had given him. Can you describe the mop?

A It was a little mop and broom that my Aunt Jane got him.

Q How big was it?

A It was kiddie size, little biddie short thing.

Q Can you tell me how many feet it was?

A Probably about two and a half, maybe three.

Q What was it made of?

[1988] A It was wood.

Q And, what did you see your mother do with the mop and broom?

A Beating him with it and breaking it over his head and his back and his legs and anywhere it would hit.

Q What did Johnny say?

A Please stop, Mommy, please, I love you, Mommy. Don't hurt me no more.

Q Do you remember another time when your mother ran hot water on Johnny?

A Yes.

Q Where were you?

A I was sitting on the toilet taking a "pp" and Mama went into Johnny's room and Johnny had wet the bed again and Mama started running hot bath water, and you could see the steam rising up out of the shower. She drug him by the nape of his neck, like a little dog, by the shirt, back of his shirt, and she threw him in the bathtub and she held his head down with his face in the drain, saying, I ought to just drowned you, you little bastard?

Q She said, drowned you, little bastard?

A Just drown you, little bastard.

[1089] Q What did Johnny do?

A He started fighting and that is when she wanted to – his eyeballs out, pulled him out of the tub.

Q Do you remember another occasion when the mother forced Johnny to drink his own urine?

A Yes, or he had to go and "pp" and he was banging on the door, wanting to go to the bathroom.

Q And, how old was Johnny at the time?

A I'm not sure. I think he was about five or six.

Q Five or six?

A But, it woke Mama up, him banging on the door, and Mama come in there, and he said, Mama I have got to "pp" and I am thirsty. So, she made him "pp" in the toilet and she made me go in there and watch.

Q Why did she want you in there to watch?

A I don't. I guess she got a kick out of it or something, I don't know. She always did that.

Q After he went to the bathroom, what did she do?

A She told Trudy to go get her a cup, and she went and got it. I can't remember exactly how she came in, came in with the cup, but, she dipped [1090] it in the commode and made him drink it and she said that's all your getting for today, so, you better make it last.

Q How full did she fill the cup?

A She filled it up to the rim.

Q Did Johnny drink it?

A I saw him drink it and I had to go outside of the door.

Q Do you remember on another occasion your mother making your brother eat his own bowel movement?

A Yes, I do.

Q How old was he?

A He was about four or five, then, and I had just had a nightmare and I wanted to crawl in bed with Mama, and Johnny was in the doorway, she was facing Johnny, with our heads up against the wall and she was facing Johnny in the doorway.

Q And, what was Johnny doing?

A He was kneeling on his knees.

Q And, what did she make him do?

A I walked by and I smelled a bad smell and I looked at Johnny and he was sitting there, he was on his

knees eating his own bowel movement out of his own drawers.

[1091] Q I'm sorry, I didn't hear you.

A He was on his knees, eating his own bowel movement out of his own drawers, his panties.

Q Was he wearing the panties he was eating something out of, or was he wearing a separate pair?

A No, he was wearing a separate pair.

Q What, did he hold the panties?

A He held them in his hand, cupped them in his hands.

Q What was his reaction to that?

A He was holding it and he was looking everywhere but, Mama's direction, he looked like he was really ashamed.

Q What did she do at this time?

A She was sitting there on the bed drinking a Dr. Pepper and watching him.

BY MRS. LIEB:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Are you married, Mrs. Anderson?

A Yes.

Q Do you have children?

A No.

Q Do you recall – well, you testified that your [1092] brother went to the first grade, is that right?

A Yes.

Q Do you recall that he actually went through the entire first grade year and failed?

A No, I don't recall.

Q You don't recall that?

A No.

Q Do you recall, or do you know that in the second, – the second time that he started through the first grade, that the school officials recommended that he be put into a special education class because he was a behavioral problem in school? Do you know anything about that?

A I was down there –

BY MR. SMITH:

Can we approach, Your Honor?

BY THE COURT:

Yes, Sir.

BY MR. PRICE:

Why can't they state their objection, if they have got an objection, from here?

BY THE COURT:

You all can approach the bench.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH)

[1093] BY MR. SMITH:

The Motion in Lemine, Your Honor, he is required to approach before he goes into prior bad acts, and what he is going to do, is to take a lot of hearsay that comes in from Johnny's mother and ask her if she knows, that is just to get it before the jury, and no way is that appropriate.

BY MR. PRICE:

Behavioral problems in the first grade?

BY THE COURT:

Okay. So far, what he has asked I am going to overrule. If you have another objection.

BY MR. SMITH:

Yes, I do.

BY THE COURT:

That objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Do you know whether or not that the reason that he failed the first grade was because of behavioral problems?

A I'm not sure?

Q Ma'am?

[1094] A I'm not sure on that.

Q Okay. Whatever the record shows on that, I guess that would be the way that it would be?

A I know my mom pulled him out.

Q Okay. You think he was put in a special education school down in Dickerson there, put in special education classes?

A I'm not sure on that. All I remember is that the first grade and Mexia.

Q Well, that is a pretty good jump from the first grade, six years old, and how old was he when he went to Mexia?

A He was about twelve, about.

Q Talking about five or six years, you don't know what happened to him in five or six years there?

A He was at home a lot of times.

Q He never did go to school?

A I would think?

Q You don't recall him going to any kind of special education school in Dickerson?

A No, I don't.

Q Okay. You didn't know anything about his problem at school, behavioral problems, as opposed to mental retardation problems, did you know that?

A No.

[1095] Q Okay. Do you recall much about when he was in the first grade?

A Very vaguely. I remember Mama took him out because she was mad at him for some reason.

Q Would it surprise you to know that he went the entire year to the first grade, and started the second time around in the first grade, and then, was put in a special education school? Is that the way the memory is?

A No, my memory is just the first grade. I remember Mama pulled him out.

Q Okay. The records indicate the school recommended that he be pulled out because he was such a behavioral problem, he couldn't be controlled at school. Would you disagree with that any?

A I don't know. I was young.

Q That could have happened, then?

A Yeah.

Q Okay.

A Possible.

Q He was put in Mexia and stayed up there about three years didn't he?

A I'm not sure how long he stayed up there. I know it was a while.

Q I think you testified a while ago, that he was [1096] how old when he went in Mexia?

A About twelve.

Q He was about how old when he came out?

A Maybe fifteen, I'm not sure.

Q About three years?

A Two or three, I don't know.

Q Your father took him out of Mexia, though, didn't he?

A Yes.

Q They didn't discharge him?

A I'm not sure. Daddy did all of the paperwork, we were kids.

Q You were what, how much younger are you than him?

A Two years.

Q He was fifteen when he came out of there, then, you would be thirteen. You can't remember that?

A No, there is a lot of things I don't remember about my life.

Q But, you can remember all of that abuse that happened when you were two and three years old?

A I had to watch it?

Q I see. But, you don't know anything about when he came out of Mexia?

A I remember we went up there to pick him up, that's [1097] all I know.

Q For Christmas in 1971, and brought him home. Does that sound about right to you?

A I'm not sure on dates.

Q Okay. You remember your father did bring him home?

A Yes.

Q And, he didn't take him back?

A No, he didn't take him back.

Q Do you know why he didn't take him back?

A Well, I thought Johnny was released, I thought that they had called.

Q You didn't know it was because of his homosexual activities?

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Overrule the objection.

BY MR. SMITH:

Move to strike the testimony.

BY THE COURT:

Motion to Strike is denied.

Q Your father never indicated that to you?

A I was young back then, I don't –

Q Thirteen years old?

[1098] A Daddy never discussed things like that with the kids, alot.

Q Okay.

A If that is what –

Q Lets talk about some of this abuse, this horrible abuse.

A He wanted – mainly he wanted to make up for Johnny, what Johnny lost.

Q Lets talk about back earlier when all of this horrible abuse that you so vividly described to the jury, you remember telling your father about all of that when would come in?

A The other kids were scared.

Q You never told your father at all about any of that?

A No, I didn't.

Q He doesn't know anything about it to this day does he?

A He does know, after Mama died.

Q Talking about your father a while ago, he is not an invalid or anything is he?

A No, he's not.

Q He is working, isn't he?

A Yes, he is.

Q Where does he work?

[1099] A He works at Walmart.

Q He lives with you, doesn't he?

A Right.

Q What would you say about the proposition that he doesn't know or doesn't agree with you as to all of this abuse? Have you got an explanation for that?

A All I know is Daddy had a stroke, two strokes, since all of this has happened, and now, he has go the brain tumor in his head, if that is what it is. They are still running test.

Q So, that has caused him to forget about all of this?

A Daddy is going blind in one eye, and he lost half of his memory.

Q I see, the half he lost, I guess, must have been about all of the abuse?

A Daddy didn't know nothing about the abuse until after mom and dad divorced, and us kids got up enough nerve to tell him.

Q How many years did all of this abuse go on?

A Eighteen years because that is how long they were married.

Q I'm talking about your mother, all of this abuse that you just said, told this jury your [1100] deceased mother perpetrated on this Defendant over here. How many years did that go on?

A Until he was in Mexia State.

Q And, you said that was about twelve years old?

A About.

Q And, your father never knew about it?

A Never knew.

Q How often have you visited Johnny in the last ten years, since he has been in prison?

A Well I have been out of state in California and Arizona, so, it has been hard.

Q How many times have you visited him?

A None.

Q Ma'am?

A None.

Q When did your mother die?

A I think she died back in '80.

Q She has testified for Johnny before, hasn't she?

A Yeah.

Q You haven't, though, have you?

A No.

Q Trudy testified for Johnny before, hasn't she?

A Yes.

Q Would it surprise you that she does not, apparently, did not know anything about all of this [1101] abuse that you just described to the jury?

A Trudy?

Q Right.

A Wrong.

Q She does know about it?

A She does.

Q Okay. But, if she didn't testify about it before, that would be one of those things? Is it your testimony that your mother would lock Johnny in the room during the day while your father was working?

A Yes.

Q And, when your father would come in at night, what would happen?

A If Johnny didn't have trouble, we would all eat together. Johnny would eat if it was early enough, if supper had already been served or something, Mama would say Johnny has already eaten, make him go without eating.

Q Your father ever talk to Johnny?

A Yes.

Q Johnny didn't tell him about any problems?

A Johnny didn't comprehend much, and Daddy was away alot and he was holding two or three jobs down, plus Mama's foot operation, he was also [1102] looking after her.

Q When was that?

A It was when we were living in Baycliff. I'm not quite sure of the date or time, and all of the abuse was going on, too.

Q Then abuse that you described to this jury at some length there awhile ago, was rather extensive horrible and lasted, based on your testimony, as I understand it, for a period of about twelve years, is that correct?

A Can you repeat that?

Q The abuse that you so vividly described to the jury a few minutes ago, –

A Yes.

Q – was rather horrible, it was a constant thing that occurred on a regular basis, and lasted for about twelve years, is that correct?

A It is about – alot constant, about, probably five days out of the week.

Q Okay. And, she would keep him locked in the room all day long, is that correct?

A When us kids were at school, I would imagine that is where Johnny was kept while she was at work.

Q Your testimony about he would be required to use the bathroom in his own room, there, she would [1103] make him do that?

A No, he wasn't made to do that, just, he would beat on the door, nobody was home, evidently, he would beat on his door, and beat on the door saying I got to go, I got to go, and then, he was forced to use it in his room.

Q Did your mother work during this period of time?

A Yes, she worked, like I said, she managed at times, she managed at one time a Stop and Go.

Q She worked days or nights?

A Sometimes both.

Q Didn't she work alot of nigh shifts during those years?

A I'm not quite sure.

Q You didn't remember that?

A No. I know she worked nights and days, she was managing seven Stop and Go's, she had to visit all of them.

Q She worked quite a bit, too?

A Yes.

Q Okay. I take it you were in school several years during the time that this abuse was going on, were you not?

A Yes.

Q Did you ever report it to anybody at school?

[1104] A We were afraid back then. Back then, child abuse didn't seem like it was legal, because everybody was getting it. It is more open and out in the area now.

Q So, I take it, the answer to my question is you did not?

A I did not.

Q Okay. You didn't tell your father about it, either, your own father about it either?

A We were afraid?

Q Afraid of who?

A Mom.

Q Okay. Afraid to tell your father because you were afraid of your mother?

A Right.

Q Okay. Where were you convicted of burglary?

A In Granberry, Texas.

Q Burglary of a habitation or burglary of a building?

A Habitation.

Q Okay. First degree felony, isn't it?

A Yes.

Q What kind of punishment did you get for that?

A I got five years probation.

Q When was that?

A It was right after mom died, probably about [1105] '81, '82, something like that.

Q You never told any school officials about it, and your never told your father about it. Who did you ever tell about it?

A We all kept it to ourselves.

Q When was the first time that you ever told anybody about it?

A When mom and dad finally got a divorce, we told Daddy.

Q Told your Daddy at that time?

A Right.

Q When they got a divorce? When was that?

A After eighteen years, I'm not sure, not quite sure the year was.

Q You don't remember when they got a divorce?

A I'm not sure.

Q How old were you?

A In the seventies, sometime, I was about eleven or twelve.

Q That's when you told him?

A Yes.

Q Did he believe it?

A Yes. He bowed his head in his hands and cried.

Q Did your mother do anything physically to Johnny that caused cuts, scars, bruises, whatever, things [1106] of this nature to him?

A He has got scars on the back of his legs, the back of both legs. Asfaras hurting him, if it was an accident, I don't know, because I wasn't born then.

Q That happened when he was two years old, when he got burned in the hot water?

A She claimed it was an accident.

Q So, did your father claim it was an accident, too, didn't he?

A Yes.

Q He was present when that happened, too, he was home when that happened?

A I don't know. I wasn't born.

Q Okay. Aside, – since your recollection, since you were born, since you remember, you were telling the jury, about all of these bad instances. What I want you to do, is tell me about any instances about where she did anything to him that was physical harm to him, caused bruises, cuts, burns?

A She used to beat him with an extension cord, belt buckles, belts.

Q Did they leave marks on him?

A Broomsticks.

Q That leave marks on him?

[1107] A Yes.

Q Bruises on him?

A Bruises.

Q Cuts?

A I'm not sure if he ever got cut. I think she hit him on top of the head, right on top.

Q Are you telling this jury, this type of activity goes on for ten or twelve years and your father never knew about it?

A My father worked full time.

Q Twenty-four hours a day, seven days a week?

A Not like you and I do now, but, more. He had to walk home, Texas City to Baycliff.

Q He did come home?

A Yes.

Q He did see ya'll occasionally?

A Yes.

Q Weekly I would assume, he would see you two or three days awhile ago, when he would come home for supper two or three times a week?

A In time for supper, I said.

Q And, Johnny would eat with you all, is that correct?

A Johnny would eat with us when Daddy was home for supper.

[1108] Q Your father never knew about these beatings and scars?

A No, Mama kept it from him for so long.

Q Was she abusive to you?

A After I had already grown, I think she gave me a bloody nose and black eye, I can't remember which, but, no, I was her favorite.

Q What about the other children?

A I remember her slapping Trudy around, and she broke Jessie's arm, blamed it on me.

Q Broke his arm on purpose?

A She was beating him because he didn't clean the yard up, and slammed the door on him.

Q Anything else?

A He was locked in Johnny's room with Johnny a lot of times, Jessie.

Q Tell your father about that?

A Yes, after Mom and him got a divorce we did.

Q You never told him about Jessie, never even told him when he broke his arm?

A Mama lied to Daddy and blamed it on me, saying he was playing on the coffee table and I pushed Jessie off.

Q Did you tell it different?

A No, we was afraid of Mama.

[1109] Q Okay. Your mother and daddy were separated at different times as you were growing up, weren't they?

A Yes, but, asfaras remembering any of them, I don't.

Q But, you know what I am talking about, don't you?

A Yes.

Q She would be gone sometimes for several weeks?

A I know she drank alot and I know she went out maybe one night a week and whatever, and got lost for a night or two, but, she would come back home.

Q Sometimes she would be gone for several weeks?

A What I heard.

Q You don't remember any of that?

A I don't remember any of those.

Q All you remember is that she was around all of the time?

- A I know that she was around. All I remember mostly is bad things that she to us kids, Johnny, especially.

Q Got a real good recollection of that?

A I sure do, I mean, it sticks in a kid's mind.

Q Yeah, and your father never knew anything about it?

[1110] A My Daddy didn't know until after they divorced.

BY MR. PRICE:

I have no further questions.

BY MRS. LIEB:

No questions, Your Honor

BY THE COURT:

Okay. You can step-down. Who is your next witness?

BY MR. SMITH:

Trudy Ross.

BY THE COURT:

Trudy Ross, Mr. Martin. If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. I would ask you after you sit down move that mic to where you can speak into it, so, everyone can hear you. Alright.

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1111] TRUDY ROSS

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Where do you live, Mrs. Ross?

A I live in Coolridge, Arizona.

Q Married?

A Yes.

Q Children?

A I have three boys.

Q What was your name before you were married?

A Penry.

Q. Are you related to Johnny Penry?

A Yes.

Q You are his sister?

A Yes.

Q Older or younger?

A I am older.

Q You are the oldest?

A Yes.

Q How much older than Johnny are you?

A Two years.

Q You grew up with Johnny?

[1112] A. Excuse me?

Q Did you grow up with Johnny?

A Yes, I did.

Q You tell the jury whether or not you think that Johnny is mentally retarded?

A Yes, he is.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir.

Q I am going to ask you to look at Defendant's Exhibit Number Ten, already in evidence, that has been identified as a photograph of the back of your brother's legs. Do you see the spots of lighter skin on that?

A Yes.

Q Do you recognize those as scars?

A Yes.

Q Did he have those scars when he was growing up?

A Yes, he did.

Q Do you remember any incident in Johnny's childhood that would account for those scars?

A Yes. Can't remember, but, when I was about four he was two, he was scolded in the sink, and then, there was another time, when he was about three [1113] or four, my mother made him stand on the sink in front of the heater, his legs facing the back of the heater, and I can remember blisters on the back of his legs.

Q Now, when he was scolded in the sink, you said he was two?

A Yes.

Q You were very little, yourself?

A Yes.

Q You have a recollection about it?

A I can remember being frightened and scared and Johnny screaming.

Q Who was scolding him in the sink?

A My mother.

Q Do you remember Johnny going to the hospital after that?

A Yes.

Q You also said that he would kneel in front of the heater. Who made him do that?

A My mother.

Q And, where was she when she was doing this?

A She was in the same room, lying on the bed.

Q And, did he say anything to her?

A He wanted to get up and go you know, away from the heater, and he said that it was hot, she wouldn't [1114] let him.

Q You say, you remember blisters on his legs?

A Yes.

Q In general, Mrs. Ross, how did your mother treat Johnny?

A She was cruel to him.

Q Did she hit him?

A Yes.

Q What did she hit him with?

A She hit him with a belt, usually, the side with the buckle, and switches, anything that she could find, and slapped him, clawed him, hit him, and one time she broke a child's broom on him, she hit him with it.

Q A child's broom? Do you know who gave Johnny that broom?

A Yes, my dad's youngest sister, Jane, brought him a little broom and mop to keep his room clean with and my mother broke the broom on him.

Q Did she beat him often?

A Yes.

Q How often?

A Quite often. It seem like he always had fresh marks on his back.

Q Did she ever use cigarettes or anything like [1115] that on him?

A Yes, she would put them to his skin.

Q Did she beat her other children?

A Yes.

Q Did she beat them the same way she beat Johnny?

A She was cruel, but, not like with Johnny. It was quite different the way she treated Johnny.

Q Did she seem to have some special feeling about Johnny?

A She had a hatred for him.

Q Did she ever punish Johnny by making him eat or drink anything?

A Yes. She had – I had witnessed her making him eat his own increment, and also, drinking his own urine.

Q Can you remember specific times when she had made him drink his own urine?

A I can remember when we were out somewhere in the car and Johnny had used the restroom in a coke bottle, and she came out – he was afraid to go outside of the car and do it, he was really afraid to do anything just, you know, what to do, he was always afraid, and she

came out to the car, and she forced him to drink it, and she was real hateful and mean to him, and she even held the [1116] bottle and forced him to drink it.

Q Was Johnny ever kept locked in his room when he was a child?

A Yes.

Q Locked in there for a long time?

A Yes. At this time, it wasn't intentionally that way, it was suppose to be to protect him at night, but, Daddy didn't know that Mama was locking him in all the time and keeping him in there sometime for days without food or water.

Q Did he come out when your father came home?

A When Daddy would come home and he was in time for supper, my mother let him out before Daddy came in, and it was like he hadn't been in there, but, when Daddy would come home, we would eat together and it would be like, things weren't even happening, but, if Daddy didn't come in on time and mother, was the one that came, you know, he didn't come in before supper, late for supper it was like Johnny was put in his room after supper, and he would ask if he had eaten, and Mama would tell him yes, but, he really hadn't.

Q When he was in that room, what was Johnny suppose to do if he had to go to the bathroom?

A Suppose to tell Mama so, she could let him out, [1117] let him go to the bathroom.

Q Okay. If he didn't tell her, what happened?

A Well, when he had to go, he would beat on the door, Mama would come in there and be real angry at him, she would slam the door and start beating on him wouldn't let him go to the bathroom, and sometimes, she would, and other times, I guess, it all depended on her mood, and then, she would beat him and lock him back in there, and he would go in the room and he would get a whipping, and she seemed to find a reason to go in there and see, find it and would spank him.

Q How did that room smell?

A Atrocious.

Q Do you remember an incident in your childhood, involving a knife?

A Yes.

Q Tell us that story, as you remember it.

A I can remember my mother coming home, she was very enraged, she was home late, late hours of the night, and I can remember – I don't remember if she started at Johnny first, or if I was the first. I just remember her kicking me and ripping my dress off, and my Dad sending me to my room, and my room was just right across from Johnny's [1118] and I remember her in there, and she was saying I was going to cut his privates off, so, you won't do this anymore, and she went and got a knife and was actually going to do it.

Q She was going to cut his privates.

A Yes.

Q Did she use the word privates?

A No, she normally used fulgar language, when it concerned Johnny or when she was enraged.

Q You said, she went and got a knife?

A Yes.

Q Did she take that knife into Johnny's room?

A Yes, and I can't remember – I don't remember how my Dad – I just know that he was there, and I remember a lamp or some object being crashed to the floor, and I remember my Dad holding her and trying to take the knife from her, and my memory, I can remember him slapping her, but, my Dad was never violent with my mother, this is the only time I can ever remember him being violent with her, and he was trying to reason with her, and I can remember screaming, Johnny was screaming, please, no, Mama, please, and that's it.

Q Could you describe the knife for us?

A I was about this long, had a black handle, and [1119] it was wide towards the handle and it came to a point at the end of the knife.

Q Did you believe that she was really going to use the knife the way that she said?

A Yes, I was very scared, I was really scared, I was even screaming.

Q What did your mother use to call Johnny?

A Seems like her favorite was Little Bastard.

Q Did she use that name affectionately?

A No.

Q Did she ever show love to Johnny?

A Sometimes after she had been beating him, which was very seldom that she did do this, but, she would hold him to her and say I'm sorry, Mommy loves you and he would say I know that you love me, I love you too, Mama, and then, there was times when around Dad that she would be a little stand offish, but, show more love towards him than normal, and around other people she would be different.

Q When there was visitors at your house, did her treatment of Johnny change?

A Yes, she always made sure that he had a shirt on whenever there were other people there be like nothing was happening.

[1120] Q Was there a reason that she always made sure that he had a shirt on?

A Yes, because the marks on his back all the time.

Q Was Johnny an affectionate child?

A Yes.

Q Was he loving to his brothers and sisters?

A Yes, he would often, even when Mama would be coming, we would try to put him back in the room, and he would thank us for letting him out and he knew all the time that we were going to get a spanking, and he would take the blame and said that he did it, so, we wouldn't get spanked for it.

Q Is it true, Mrs. Ross, that you testified earlier in this case?

A Yes.

Q You didn't tell all of the details that you are telling now, did you?

A No, I was a little reluctant in dealing with a lot of details.

Q Is there a reason for that?

A Yes.

Q What was the reason?

A My mother was there.

BY MR. SMITH:

Pass the witness.

[1121] CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Ross, are you still married?

A Yes, I am.

Q Where do you all live?

A Coolridge, Arizona.

Q Where did your mother live?

A My mother?

Q When she died?

A She was living, I believe in Fort Worth.

Q Fort Worth? Moved back to Texas. Wasn't she living in Arizona about ten years ago, herself?

A I really don't know. My mother lived a lot of places. I wasn't around my mother that much after she left.

Q You had testified before on behalf of your brother, have you not?

A Yes.

Q And, as Counsel just pointed out, you didn't testify about all of these details of abuse at that time, did you?

A No.

Q Are you telling this Court and this jury, now, under oath, that the reason for that was because your mother also happened to be in the same town [1122] or in the same Courthouse?

A She was in the same Courthouse, yes.

Q So, what effect did that have on you?

A It scared me, it frightened me.

Q When you were in the Courtroom testifying, she was outside, she couldn't come in just like this trial, other witnesses can't come in, can they?

A Yes.

Q And, that was the way that it was at that time, wasn't it?

A Yes.

Q But, she didn't know what you were testifying to?

A You know, I would not know if someone, somehow would tell her something. I was afraid.

Q Alright. How old were you then?

A I am thirty-six.

Q You were twenty-six then, I guess?

A About that.

Q Okay. Your father knew about all of this abuse I take it, then, didn't he?

A He was working all the time. He really didn't know the extent of it. He was trying to help mother, he knew that mother had mental problems, and, he tried to help her, he tried to help her.

[1123] Q What is the answer, did he know about the abuse, or didn't he know about the abuse?

A I don't think he knew the extent of it. I really don't know. Working all the time, when he came in, everything was normal, when he would come home.

Q You are two years older than this Defendant, are you not?

A Yes, Sir.

Q What period of time, over what period of time, did all of this abuse take place, that you recall?

A The first I recall it was when Johnny was scolded, in the sink, that is from the first that I remember that it started.

Q When his legs got burned in the sink?

A Yes.

Q Your father was home when that occurred, wasn't he?

A I don't remember.

Q Ma'am?

A I don't remember.

Q You do not remember that?

A I just remember being frightened, is all that I remember. I remember what happened. I do not remember who let him in or anything, I just don't remember that part.

[1124] Q You remember when he got burned in the sink, is that right?

A Yes.

Q You don't recall how it happened?

A I was only four, barely four, I just a child myself, I just remember, – Well, it would just kind of kept kind of quiet, but, I know that my mother was bathing him, he was screaming, I can remember that, and I can remember him coming home from the hospital.

Q Can you also remember that what she did was leave out of the room and he got the water turned on, or not?

A I don't remember.

Q And, he was on the other side of the sink, and he actually got into the water and burned himself?

A No, I don't remember that. I just remember that I was frightened and scared.

Q Well, obviously, anytime anybody is injured like that, you were four years old, that would stand to reason you were frightened. You are not setting here and telling the jury, you are not testifying under oath that she intentionally burned his legs like that are you?

A Yes.

[1125] Q You are telling the jury that?

A So many things that she did do to him.

Q How do you know that?

A Because I saw it.

Q Oh. Maybe I just misunderstood your testimony. I thought that you said that you couldn't remember anything but, just –

A I saw him there in the sink, with my brother. I said I didn't remember my father being there.

Q But, you remember your mother? What did she do, hold his legs under the water and burn them, is that what she did?

A She was standing there while he was screaming.

Q Ma'am?

A I remember her standing there while he was screaming.

Q Yes ma'am, but, there is a difference between that and if she testified that she had gone out of the room and

he got in the hot water and she came running back in the room and got him out of the water and then, she carried him to the hospital?

A She didn't run back to rescue him, no.

Q What do you remember?

A I remember her staying there over him while this [1126] was happening.

Q So, you are telling this jury, that she just burned him?

A Yes.

Q Okay. But, you didn't tell that under oath the last time that you testified, did you?

A No.

Q Sure didn't. You said she always made sure that he had a shirt on, is that right?

A Yes, she did.

Q Because he had marks on him?

A Yes.

Q What were these marks from?

A From belts, switches, he had claw marks on him, too. My mother had long nails, and she clawed him.

Q Clawed him?

A Yes.

Q And, she hit him with belts?

A Yes.

Q Did they ever cut him?

A Yes, he had deep marks in his back, deep marks.

Q So, she kept shirts on him all the time?

A Yes.

Q You didn't testify about that, before, either, did [1127] you?

A I don't remember.

Q You haven't read your testimony from before?

A No.

Q You haven't?

A No.

Q Okay.

A I really don't remember what all I said last time.

Q Do you remember testifying before Johnny was mean to his brother, little brother Jesse?

A No, I don't recall.

Q Do you recall that now, that he was mean to Jesse?

A No, Johnny was never intentionally mean.

Q Never was?

A Excuse me?

Q Never was?

A No.

Q I am going to direct your attention back to one time previously that you testified and in response to a question from me, I asked you, "Ms. Penry," and I believe your name was Penry at that time, is that right?

A Yes.

[1128] Q "Isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct? "Yes."

A My mother was mean to him, to my younger brother Jesse.

Q The question here was, whether Johnny Penry, this Defendant, was mean to Jesse, and your answer was yes, it was?

A He was never intentionally mean to him.

Q Then, I said, "Did this go on for several years?" And, you answer, "Yes, Sir." "Question, He also had problems with other children in his own peer group or his own age, didn't he? Answer: Yes."

A Well, he was mentally retarded and he was abused at home.

Q Yes, ma'am. I am asking you about violence, now.

A I never said he was mean and cruel to other children. He just didn't act normal around them.

Q Are you saying that this testimony didn't occur, that I just read to you?

A No, but, I am telling you what I meant by what I said.

Q I am just going by just what you were asked and what you answered. You were asked, "Was he mean [1129] towards your brother, Jesse? And, your answer was "Yes," and I asked you then, "Did this go on for several years," and your answer was "Yes, Sir."

Also, do you recall testifying about him taking a sharp object and picking the skin off the bottom of his brother's feet? Do you remember that?

A I don't recall testifying to that.

Q You don't? Do you ever recall that you testified that he would get violent at time at home with you all?

A No, I don't.

Q See if this refreshes your recollection. "Question, of course, this information had to be related to the doctor by someone. Would you say that whoever gave that information was in error?" And, we were talking about some information that was given to doctors about child abuse, and you said, "Well, no, because he would get violent sometimes with us at home."

A I don't recall saying that.

Q You don't recall saying that?

A No, Sir.

Q Okay. Do you recall when he got out of prison on that rape charge in 1979?

[1130] A Yes, I recall that.

Q And, you recall that he went to live with his Aunt and Uncle?

A Vaguely. I don't remember everything that happened at that time. I was kept pretty busy myself.

Q Okay. We are not talking about thirty years ago now, we are talking about ten years. Do you remember, that, when he lived with your aunt and uncle for a little while?

A I remember that vaguely.

Q Do you remember that he had to move out from your aunt and uncle's move back in with your father, because they couldn't control him? You remember testifying to that?

A I remember him coming back to live with Dad,

Q Okay. You remember testifying that was because your aunt and uncle couldn't control him?

A They didn't know how to handle Johnny. Not that he was mean or anything, that wasn't the case. They didn't – it was a burden on them.

Q What did your father have to say about that stinking room that he was kept in?

A At what point are you talking about? I don't understand.

Q During the whole time that he was locked in that [1131] room in your home?

A He said, he would tell Johnny to keep his room clean and to tell Mama when he had to go to the bathroom.

Q He never thought that was because he stunk like that, that your mother was abusing the child?

A At the time I was just a child myself. I don't know what Daddy knew at the time that I was a child.

Q Okay. Well –

A All I knew is I was afraid to say anything myself.

Q Could it be, Mrs. Ross, that Johnny was a real bad behavioral problem?

A No.

Q That's not true?

A No.

Q How do you know that?

A Because Johnny was loving and affectionate and he liked to be around people and he liked to be treated just like every other child would.

Q You got a good memory of that, but, you couldn't remember the other side of it?

A Well, mainly because the others were the bad things, were more numerous, and they were wrapped more around my child-life than ten years ago. Alot [1132] of things I try to forget.

Q In other words, you remember more now than you did ten years ago, or you remember less now?

A I remember more ten years ago than I would now. I was afraid to say a lot then.

Q You sure didn't testify this way ten years ago, though, did you?

A I didn't testify against him.

Q You didn't?

A It was clear that my mother did abuse him.

Q You and your mother both testified for him, didn't you?

A I don't know how she testified. I didn't hear her testimony.

Q She didn't know how you testified either, did she?

A Not that I know of.

Q You are telling this Court that you went into that Courtroom and committed perjury, in effect, because you were afraid of your mother?

A No, at that time I told what I felt. I just withheld some things.

Q If you said that he was violent then, then, your memory was better then than it is now, is that what you just got through saying?

[1133] A No.

Q That's not it?

A Not it.

Q How many times have you visited him in prison in the last ten years?

A I have been out of the State of Texas for seven to eight years, and I went to see him a couple of times before I did get married and leave Texas.

Q What, ten years ago?

A Yes.

Q And, since then, how many times have you been to see him?

A I haven't seen him until today.

Q You haven't seen him?

A No. I have talked to him on the phone a couple of times, but, I have not seen him.

Q Was his room fairly bare asfaras furniture and things of that nature?

A Well, at one time, it was a bed and a chester drawers in there and eventually there was just a bed and then, there was, I can just remember the frame of the bed, and then, I can remember just a mattress being in there and then, I can remember a time when there was nothing in there.

[1134] Q Why did they keep stuff out of his bedroom?

A I don't know. It was just – it was like it was Mama didn't want Johnny to have anything.

Q Okay. Let me see if this refreshes your memory ten years ago. You probably had a better memory then than you do now. "Question: Was there any reason that she kept things out of there?"

Talking about the room, and your answer was, "Yes. What was that reason? Answer: So, he wouldn't hurt himself."

A That was the reason that we were given when we were children.

Q Okay. Okay.

A But, older, I can understand that, that wasn't really the reason.

Q Well, you were twenty-six years old when you gave that testimony under oath, were you not?

A Yes.

Q You were older then, weren't you?

A Yes.

Q And, you were under oath to tell the truth, weren't you?

A Also, I was reluctant because of my mother being there. I did tell the truth, but, I didn't tell the surrounding, the reason why.

[1135] Q Well, is it true that the reason that the room was kept bare was so that he wouldn't hurt himself?

A That was what reason that we were given as children.

Q Is that true as a twenty-six year old woman, did you believe that was the truth when you testified under oath to that?

A No, Sir.

Q Okay. So, you then, lie, then, under oath?

A No, I didn't, lie.

Q Okay.

A I just didn't give the surroundings of the statement.

Q Were you living with your father in 1979, when this Defendant came back home, after he had been living with your aunt and uncle and they couldn't control him?

A Yes.

Q Okay. You were living there, and I think, he stayed there about nine days before he was arrested for this murder, is that about right, nine or ten days?

A I don't recall how long it was.

Q How long had he been out of prison on that rape charge before he was arrested on this case?

[1136] A It was a short time. I can't remember how long.

Q A couple of months, something like that?

A Something like that.

Q You are two years older than the Defendant?

A Yes.

Q Did you know that your parents, your mother included, took him to the University of Texas Medical Branch in Galveston for testing when he was about eight or nine years old?

A I remember that they were getting him prepared to go to a state school to get help, but, I don't – I don't remember when he went. I just remember him going there at one point in his life.

Q Lets back up. Do you remember when he went to the first grade?

A I wouldn't remember when he was in the first grade.

Q You would have been, what, the third grade?

A Third, yeah.

Q He failed the first grade the first year, did he not?

A Yes. Actually, he wasn't really in school that much, though.

Q Do you recall that the problem that he was having [1137] at school was behavioral problems?

A Yes.

Q And, then, they suggested that he be put in a special education school, did they not?

A Well, I remember him being put into one, and I don't remember why, or exactly when.

Q Okay. Your mother and father were doing that, were they not?

A Yes.

Q Okay. All of this abuse going on during this time?

A Yes.

Q Okay. When he was going to school and going to the special education school, when, he was in the first grade?

A Yes. A lot of times he wasn't – I remember Mama took him to Dickinson to a special school, I believe, and a lot of times she didn't take him.

Q What about the first grade?

A Alot of times she didn't send him to school, either.

Q If the records indicate it was because he was a behavioral problem, is that consistent with your memory?

[1138] A That is, I remember, yes, it had to do with some behavioral problems, but, nothing to do with mental problems or anything like that, just he was an emotionally disturbed child.

Q Okay. But, he wasn't emotionally disturbed around the house, he was abused at home, but, he was at school, he was emotionally disturbed?

A If you were abused, you would probably be emotionally disturbed, and other people, too.

Q What I am saying, you say at home, that he was a loving, tender child, never did anything of that type?

A As long as my mother when she was gone, we would sneak him out of the room, and yes, he tried, he tried to be – to play with us and stuff, and enjoy himself, but, yes, he still had problems. He would scared wondering if my mother was coming, and he was scared, frightened.

Q But, he wasn't mean?

A No.

Q So, if you testified to that ten years ago, what is your explanation now?

A I don't believe I testified to him being mean, when we were children or anything like that, [1139] or in the sense, that he was intentionally mean.

Q What about his violence towards Jesse and others?

A He wasn't trying to hurt Jesse, he would be – they would both be trying to occupy themselves they had no toys there, they had nothing there.

BY MR. PRICE:

May I approach the witness, Your Honor?

BY THE COURT:

Yes, Sir.

Q I want to show you your testimony, Ms. Penry, just so that you won't think that I am inventing this some way or another.

BY MR. SMITH:

What page?

BY MR. PRICE:

Page 454, cross examination, about the third question, fourth question.

Q I ask you, and you read along with me here, "Ms. Penry, isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct?"

And, what was your answer?

[1140] A "Yes."

Q Okay. Is that your answer today?

A Yes.

Q Was he mean towards Jesse?

A He wasn't mean intentionally towards his younger brother. I did not surround that answer with another comment. I didn't specify the happenings of what things went on, what happened, I just merely answered the questions.

Q And, the next question, "Did this, go on for several years?" And your answer was,

A "Yes, Sir."

Q Okay.

A But, I was probably thinking about the whole thing that was going on with my younger brother, not just that, but, the thing with my mother, and everything surrounding it.

Q Then, the next question says, "He also had problems with other children in his own peer groups or his own age, didn't he?" And, what was your answer?

A "Yes," but I didn't say it was because he was mean to them.

Q Well, I think, that was what we were talking about, wasn't it, being mean to Jesse?

[1141] A That was not testified, was he mean to other children.

Q Okay. Okay. I want to direct your attention to Page 456, of the transcript. "Question: There have been some medical records that Johnny's lawyers introduced some medical records here yesterday, and in those records there are some indications that there was a lot of violence conduct that he exhibited particularly towards other children and I am talking about over a period of several years, starting back in the first grade area.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir. What do you need?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Before the jury, reading a question from a document in evidence from a prior trial, which is not in evidence in that trial, being prejudicial and requests to strike it.

[1142] BY MR. PRICE:

Proper cross examination. She has indicated that he wasn't mean or violent towards anybody, and in her prior testimony, just a one hundred eight degree difference.

BY MR. SMITH:

Those questions, I didn't object to that. That question, just recites that there were records that were in

evidence, the trial record, but, no such records in evidence here, and I am going to oppose any records coming in here.

BY THE COURT:

Let me see the question.

BY MR. PRICE:

And, a couple of answers. This is a competency hearing, and incidently, this is not the capital murder trial.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

Just for the record, the objection is under the Fifth, Sixth, Eighth and Fourteenth Amendments to the constitution, corresponding with the Texas Constitution [1143] and Texas Code of Criminal Procedure.

BY THE COURT:

Still overruled.

Q I am going to direct your attention back to the question, Line 15, Page 456 of the transcript. "There have been some medical records that Johnny's lawyers have introduced, some medical records here yesterday, and in those records, there are some indications that were a lot of violent conduct that he exhibited, particularly, towards other children, and I am talking about over a period of several years, starting out back in the first grade area." Was your answer. "Yes, Sir"?

A I wasn't answering yes, that he was being mean to the children. I was answering the question that are based on the medical records.

Q Okay. Next question. "But, of course, this information had to be related to the doctors by someone? Would you say that whoever gave that information was in error? Answer: Well, no, because he would get violent sometimes with us at home."

Is that your answer?

A I don't remember.

[1144] Q Don't remember, oh, okay. I didn't misread is, though, did I?

A No.

Q You were still living at home when he went to Mexia State School, were you no?

A Yes.

Q Your parents got him into the Mexia State School, did they not?

A Yes.

Q They took him up there, did they not?

A As I remember it.

Q And, occasionally they would go visit him or get him and bring him home, on a furlough type thing?

A I don't ever remember them bringing him home, Don't remember moments of ever wanting to bring him home, and I remember going to visit him, and taking him

out for maybe a couple of hours, I don't recall bringing him home. We could have but, I don't remember.

Q How many years was he in the Mexia State School?

A I don't remember that either.

Q Was it about three, be a ball-park figure?

A Perhaps, but, I don't remember.

Q You know about what age he was when he went in?

[1145] A I don't remember, except maybe around twelve or something like that. I don't remember.

Q Did you ever go to the Mexia State School?

A Yes.

Q That is a school, too, is it not? It is not a hospital for the mentally ill or something?

A We were just explained that as children that it was just like a little community that he lived in. I really don't know what it was. I just know what Dad would tell us.

Q Did he ever tell you about any problems that he had up there at the school?

A I don't remember.

Q Do you recall testifying before that he told you that he didn't like it because he couldn't get along with the boys, with some of the boys up there?

A I remember him saying that he didn't like being there. I don't remember as to why at this date.

Q You also, recall that he also told you that he didn't like the teachers up there?

A I don't remember.

Q Okay. If you testified to that before, would that be accurate?

[1146] A I don't even remember.

Q Let me show you your testimony from before and see if it refreshes your memory, a little bit.

BY MR. SMITH:

Can we have the page?

BY THE COURT:

What page, Mr. Price?

BY MR. PRICE:

Page 467. Start with Line 18.

Q "Did he ever talk to you about the Mexia State School? Answer: Once in awhile. Question: Did he like it? Answer: No. He talked about a lot of things that happened to him that weren't good and things like that. Question: What were some of the things that he would tell you about that? Answer: Well, he couldn't get along with the boys, there. He didn't like the teachers."

Is that your answers?

A Yes,

Q Is that pretty well the way that you remember it now?

A Yes.

Q Okay. Your father took him out of Mexia State School, did he not?

[1147] A Yes. I don't think my Dad ever really wanted him to be there. It was just to protect him.

Q Do you recall why your father took him out of the Mexia State School?

A Because he learned everything that wasn't proper.

Q Like homosexuality?

A Yes.

Q You think he learned it up there, is that what your father thought?

A That is what I was told. I don't know if that is what Johnny learned. I just know that is what Dad told me at the time when we were children.

Q And, when he took him out of the Mexia State School, your mother wasn't around at the time, was she?

A I can't remember. I remember he being there when he moved to Goodrich, and I remember my mom being there but I don't remember at what point in life.

Q Didn't they get a divorce shortly after that?

A My mother left.

Q And, didn't they –

A Shortly after we moved to Goodrich, my mother left.

[1148] Q And, they got a divorce sometime after that?

A Yes.

Q Did they get into a custody dispute also?

A Yes. It was a fight between the two of them.

Q Okay.

A For a period of time.

Q Do you recall when your brother may have gone to Austin State Hospital, and Rusk State Hospital on a commitment out of Harris County?

A I remember him being there, but, I don't remember why or when, or when he came home. I just remember that part in life.

Q He wasn't at home when he got committed to those – to that hospital, was he?

A I don't remember.

Q Okay. Your memory is bad in that area?

A Well, I just – I remember a lot of the incidents, but, sometimes, I don't remember before or after the incident.

Q You don't remember him getting into any kind of trouble in Houston, Texas?

A I don't remember

Q Don't remember that?

A What happened, no.

Q When he was seventeen years old, how old would [1149] you have been?

A Nineteen.

Q And, you can't remember what happened when you were nineteen?

A No, I can't remember what happened at that time.

Q Okay. But, you can remember what happened when you were four years old, when he got burned?

A Because I was scared.

Q And, all of those others?

A And, I was abused as a child, also, that is why I remember those things so well.

Q What effect has it had on you?

A Well, I, me, being abused, as a child?

Q Yes, ma'am.

A Well, it hasn't had a very good effect. It has made me want to do my children better than my mother did me.

Q Better or the same way?

A No, definitely not the same way.

Q Better?

A Yes, Sir.

Q And, you haven't gone out here and killed anyone, either, have you?

A No.

BY MR. PRICE:

[1150] I pass the witness.

BY THE COURT:

Any other questions of this witness?

BY MR. SMITH:

Yes, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Mrs. Ross, is it hard for you to talk about all of these things that your mother did as a child?

A Very hard.

Q When Mr. Price read you a question talking about a medical record, you remember that?

A Yes.

Q And, the question said, information had to be related to the doctors by someone. Do you remember that?

A Yes.

Q Do you know who the someone was that gave the information to the doctor?

A No.

Q You don't know whether it was your mother?

A I don't remember. I don't know. I don't remember.

BY MR. SMITH:

Pass the witness.

[1151] BY THE COURT:

Does the State have any other questions of this witness?

BY MR. PRICE:

Just a moment, Your Honor.

No further questions, Your Honor.

BY THE COURT:

Okay. You can step-down, Mrs. Ross. You are not to discuss your testimony with any other witnesses. You are under the rule, you understand?

BY MRS. ROSS:

Yes, Sir.

BY THE COURT:

Not to ask them what they said. At this time, we will recess for about fifteen minutes. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 10:30 A.M. A FIFTEEN MINUTE RECESS WAS HELD.)

(JURY IN AT 10:50 A.M.)

BY THE COURT:

Who is your next witness, Mr. Wright?

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1152] BY MR. WRIGHT:

Jesse Penry.

BY THE COURT:

If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. Okay. Mr. Wright, you can proceed.

JESSE PENRY

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your full name for the record, please, Sir?

A Jesse DeWayne Penry.

Q Where do you live, Sir?

A 464 West Army, in Coolridge, Arizona.

Q How old a man are you?

A I am twenty-eight.

Q How are you employed?

A I am manager to a pizza place in Coolridge.

[1153] Q Are you related to Johnny Paul Penry?

A Yes, I am.

Q And, how are you related to him?

A Brother.

Q Okay. Are you older or younger?

A Younger.

Q About how many years younger are you?

A I don't know exactly.

Q Alright.

A A few years?

A Yeah.

Q Did you grow up with Johnny?

A Yes, I did.

Q Is Johnny mentally retarded?

A Yes, he is.

Q How do you know?

A Just by trying to teach him to read and write. I have always known more on reading and writing than he did.

Q Okay. Was Johnny treated the same by his mother as you and the other siblings?

A We were both treated badly. But, Johnny was the worse.

Q Okay. Is it to believe that Johnny was really your father's child?

A No.

[1154] Q Sir, for the purposes of the printed record, does Johnny look strikingly different from the rest of his siblings?

A Yes, Sir, he does.

Q Over all, Jesse, speaking of Johnny, was he mean and violent?

A No, he was not.

Q Did Johnny have any tendencies to take the blame for things other than his?

A Yes, he did.

Q Jesse, some years back, isn't it a fact that you did get a conviction for burglary?

A Yes, Sir.

Q Is that in Granberry?

A Yes, it was.

Q Here in Texas?

A Yes.

Q Did you get a probation?

A Yes.

Q Did you successfully serve out your probation?

A Yes.

BY MR. WRIGHT:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

[1155] Q Is that burglary of a building or burglary of a habitation?

A Burglary of a habitation.

Q And, how many years probation did you get?

A Five years.

Q When was that?

A About ten or twelve years ago.

Q You live down the probation, okay?

A Yes, Sir.

Q No problems?

A No.

Q Were you with your sister?

A Yes, I was.

Q When that was committed?

A Yes, Sir.

Q Okay. That is the same offense, or both together?

A Yes.

Q You got no other convictions, I take it?

A No.

Q Okay. And, certainly no violent crimes or whatever in your past?

A No.

Q How old were you when this Defendant went to the Mexia State School, if you recall? Or do you remember much about that?

[1156] A I don't know when Johnny left and came back, I know when he was there, but, then, disappeared and I don't – I don't really remember how it came in like that.

Q Do you remember when he came back, after he got out of Mexia State School?

A I remember, yes, in Goodrich.

Q Okay. And, he lived there with you and your father for a while?

A Yes, all of the girls and us two boys lived in Goodrich.

Q And, were you also, living with one of your aunts?

A My aunt was living with us, well, –

Q The other way around?

A What I am saying, staying at one of my aunt's houses.

Q What aunt was that?

A Evelyn.

Q What is her last name?

A Young.

Q Was she the one that was living with you?

A No, she was living beside us. She had her house and, well, this was her house that we were staying in, too.

[1157] Q That was after he got out of Mexia?

A Yes.

Q Okay. And, how long did he live there with you and your father and sisters after he got out of Mexia?

A I don't know. I was being pulled between the two parents, so, –

Q You go to your mother's some?

A Right.

Q They were having a custody dispute between them over the divorce, is that fair to say?

A Yes.

Q Were you around when he went to Austin State Hospital on a commitment out of Harris County?

A I was gone. No, I don't remember that. I mean, I remember it, but, I don't. I wasn't around.

Q Okay. You do know that he did go to the Austin State Hospital?

A Yes.

Q Transferred there to Rusk?

A Yes.

Q Were you gone from home, the entire time he was in those two hospitals?

A Yes.

Q It was about a four or five month period, I [1158] guess, is all that it amounted to, but, you were not home at that time?

A Right.

Q Do you know why he went to the hospital?

A Just bits and pieces. I never did hear the whole story of it.

Q What are the bits and pieces that you remember?

BY MR. SMITH:

Objection, speaking hearsay.

BY MR PRICE:

I didn't understand the objection.

BY MR. SMITH:

Hearsay.

BY THE COURT:

Sustain the objection.

Q Did you know that he had left home before he wound up in the Austin State Hospital?

A No.

Q You didn't know that he had lived in Lufkin, for a while, worked at a restaurant there in Lufkin?

A No, not at the time. I was in Ohio.

Q Okay. Is that where your mother was at that time?

A Yes.

[1159] Q When did your mom pass away?

A Eleven or twelve years ago. I think it was in 1980, December, or right before Christmas.

Q How old were you – well, you are six years younger than, or approximately six years younger than Mr. Penry is?

A I am twenty-eight, Yes, Sir.

Q Somewhere in that area. You don't, I guess you don't remember much about his early childhood then, do you?

A Well, I remember bits and pieces of, you know, the little things, that a kid will remember.

Q How old were you when you have your first recollection?

A I don't know how old I was.

Q Two or three years old?

A I don't know how old I was.

Q Okay. Do you remember him going over to Mexia State School?

A No, I don't. I remember going to visit him.

Q Okay. With your parents?

A Right.

Q That includes your mother?

A Yes.

Q Are you married?

[1160] A Yes, I am.

Q Do you have children?

A I have a step-daughter.

Q Are you employed?

A Yes, Sir, I am.

Q Who are you employed by?

A Ricardo's Pizza.

Q In your recollection, your earliest recollection of this Defendant, do you recall him being violent?

A No, I don't.

Q Do you recall an instance where he took a sharp object and peeled the skin off the bottom of your feet?

A Yes, I do. If he ever went – he did this, but it wasn't as if he ever made me cry or anything. He would always pat me and say he didn't mean to.

Q He did hurt you some?

A I can only remember one or two instances, yes.

Q You were a very young child at that time, weren't you?

A Yes, I was.

Q But, it sticks out in your mind, though?

A Yes.

[1161] BY MR. PRICE:

I have no further questions.

BY THE COURT:

Any other questions?

BY MR. WRIGHT:

Nothing further, Your Honor.

BY THE COURT:

Okay. You can step-down. You are not to discuss your testimony with any other witness.

Who is your next witness?

BY MRS. LIEB:

Lucille Anderson.

BY THE COURT:

Lucille Anderson.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT: Just have a seat and if you would, when you sit down would you move that mic around where you can speak into it so everyone on the jury can hear. Alright.

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1162] LUCILLE ANDERSON

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Lucille Anderson.

Q And, what town do you live?

A Willis, Texas.

Q Are your related to Johnny?

A I am Johnny's aunt.

Q And, that is on his father's side, is that right?

A Yes.

Q Do you remember your brother's first wife, Shirley?

A Yes, I remember Shirley.

Q She is Johnny's mother, is that right?

A Right, uh-huh.

Q How old was she when she married your brother?

A About sixteen.

Q Can you describe her personality at that time?

A Well, at the time, she was very unhappy because her mother had passed away.

[1163] Q When was the first time you saw Johnny?

A The first time I saw Johnny was when he was brought to me from Laughton, Oklahoma, as an infant baby, three weeks old, his mother was in the hospital, had to be put in a mental hospital at the time.

Q And, you saw him when he was three weeks old?

A Yes.

Q And, who brought him to you?

A My brother and some of his friends from Laughton, brought the children to me because the mother had to be put in the hospital.

Q You were living in Texas at the time?

A Yes, in Houston.

Q Did you take care of the child?

A Yes, for eight months.

Q Okay. Can you describe him physically as a child?

A Beautiful. They brought him to me in a bassinet beautiful little baby boy.

Q Did there come a time when your brother and Shirley returned from Oklahoma?

A Yes. After they released her from the hospital, mental hospital in Laughton, they came to home to take the responsibility of their little children.

[1164] Q And, you were taking care of another child, also?

A Trudy and Johnny.

Q And, did they live with you?

A Yes, for about two months, until they could get on their own.

Q When Shirley returned, did she take-over the responsibility for Johnny?

A She tried, but, it was very hard because the children were looking to me, I was like mama, and it was hard for her, but, she tried.

Q Did you see Shirley show Johnny affection?

A At times she was affectionate, not any long period of time, she would kiss them and love them.

Q Did you ever hear Shirley call Johnny any names?

A Yes.

Q What would she call him?

A The Little Nut, the Little Spoil Brat, the Little Bastard.

Q Was there a meaning behind the name, Little Bastard?

A The only meaning that I could put behind that, is that she said, that is my brother, she come home with us, pregnancy, two months preganant [1165] with Little Johnny, and she knew I knew it.

Q You knew that?

A So that would be behind the words, I suppose, that she would use, and there was jealousy because there was affection towards me like mama, and I could see, you know, why she would feel that way, because it was very hard to turn to the real mama.

Q Did you ever see Shirley slap Johnny when he was a little baby?

A Yes. Not just a slap, she would sock him when he would be sitting in the high chair eating, right in the mouth.

Q See that on more than one occasion?

A I just saw it that one time, and I don't know how many more times it could have happened.

Q How old was he when she socked him in the mouth?

A She had been in our place about two months, after they came home from Laughton, and it was sometimes between those two months that they had to stay with us, until they could get on their own.

Q So, you saw Shirley sock him when he was about ten months old?

A Just a little baby in a high chair.

[1166] Q You were eating at the time?

A Yes.

Q What happened to the food in his mouth?

A If you have a mouth full in your mouth, you are going to spit it out if you are slapped in the mouth.

Q You know what triggered the slap?

A She didn't like the way he was chewing it, or eating. I guess it was kind of, you know, little babies, takes time to learn.

Q Did you see a disciplinary slap, or something worse?

A I can only talk about what I saw.

Q Right. But, was that a normal disciplinary type thing?

A Not towards a little baby, no.

Q It was rougher than that?

A Yes.

Q Did you say something to Shirley when you saw that?

A Well, since we already knew, that I knew that Little Johnny – she was pregnant with him when she came home and my brother forgave her and took him in, gave him his name and to be his father, he tried to be a good father, but, [1167] she knew I knew that he was not my brother's son.

Q Okay. Did you say something to her?

A I told her, I said, that he couldn't pay for what she done wrong, that was her doing, not him, and he wasn't to blame.

Q Meaning that Johnny wasn't to blame?

A Little Johnny was not to blame for the way that he was brought into this wicked system.

Q What did Shirley say to you?

A She didn't say anything, she just looked at me.

Q And, you said that the family moved out when Johnny was about ten months old or so?

A Something like that.

Q Sometime thereafter, did you see Johnny with a broken arm?

A Well, sometime within that first year, I saw his arm in a cast. I did not see the accident, I asked about it, the answer that I got, was that –

BY MR. PRICE:

Objection, Your Honor, to hearsay.

BY THE COURT:

Okay. Don't tell us what someone else told you.

[1168] Q But, you didn't see what happened?

A No, I didn't see it.

Q But, you saw his arm?

A I saw his arm in a cast, right.

Q Was there a time later on when Shirley left one or more of her children with you again?

A Well, she left my brother again some time later, this was after they were situated in their own little home, she left again and was gone for quite some time, I do not remember how long, and she took only Trudy with her and not Johnny, and left Johnny and then, later Trudy was dropped off at my house with impetigo and I, as soon as I got her well, over the impetigo, she came back to get Trudy.

Q Did she want to get Johnny also?

A No, she didn't mention Johnny.

Q Was there a time ever that Shirley physically attacked you?

A Yeah, this one time when she came back just to get Trudy, after I had gotten her well over the impetigo, yes, she attacked me and was accusing me of stealing her children's affection. I knew that she was not well, I knew that she was mentally ill, by the way she acted, but, [1169] I did have to ward off some blows.

Q She actually, –

A She actually attacked me.

Q Did the police come?

A My son had called the police because he was afraid for his mother, naturally, yes. The police came and they had her to leave because she was disturbing the peace, and a man was parked down the road a little ways in a truck, waiting for her and she left with him.

Q And, after Johnny was no more than a little baby, you physically lost touch with him, didn't see him too much?

A I would see him occasionally at family reunions.

BY MRS. LIEB:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Anderson, I believe back when Johnny was seventeen years old, did he run away from home?

A I heard that he had, but, I don't know that he had.

Q You don't? You do know that he got arrested in Houston, don't you?

BY MR. SMITH:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[48:1245] speak into it. Slide around, talk into it so everyone can hear you. Alright.

BILLIE JOHNSON

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Mrs. Johnson, please, state your name?

A I'm sorry, I'm a little bit hard of hearing.

Q I will try it this way. Please state your name.

A My name is Billie Johnson.

Q Where do you live?

A I live in Baycliff.

Q How long have you lived in your house in Baycliff?

A Almost thirty-five years.

Q You know Johnny Penry?

A I knew him when he was about two years old.

Q And, how did you know him?

A They were my neighbors.

Q And, about what time, or when were they your neighbors?

A I would say it was about thirty-two years ago, something along there.

[1246] Q So, they were your neighbors when you were living in the house that you are living in today?

A Yes.

Q What sort of a home did they live in at that time?

A They lived in a mobile home.

Q And, where was that mobile home located in relation to your house?

A There back yard butted my back yard. It was about maybe a hundred, hundred and twenty-five feet, from my home.

Q Would it be fair to say that you were the neighbor that lived the closest?

A I'm sorry.

Q It is fair to say that you were the neighbor that lived the closest to them?

A Yes.

Q And, how old did you say Johnny was when they lived there?

A He was about two years old, I would say.

Q Did you know the Penrys well?

A No, I didn't know them very well.

Q Why is that?

A Well, I was pretty busy, and they didn't live there but just a matter of months. Shirley [1247] Jean and I would talk, we didn't have a fence, but, you might say it was over the fence talk, and she told me that she had been in a mental institution, she had been expecting a baby at that time.

Q How many children did you have at that time?

A I have seven. I had seven at that time.

Q Can you describe Johnny's physical appearance at that time?

A I'm sorry?

Q Can you describe Johnny's physical appearance when he was about two years old?

A Can I describe who?

Q Johnny's physical appearance.

A Oh, he was a thin, little boy. He was beautiful, long, black eye lashes, and such a sweet little boy.

Q Did anything unusual happen to you after the Penrys moved in?

A Yes.

Q What was that?

A After her baby was born, every afternoon right after lunch, I would feed my children their lunch and give them their bath and put them to bed for a nap, that was my two younger ones, [1248] and then, I would go have coffee, and that was my time of the day that I could do as I pleased, and, then, I would start hearing these screams, terrified screams, horrible screams. It was fear and pain and pleading in them.

Q Where did the screams come from?

A I'm sorry I couldn't hear you.

Q Where did the screams come from?

A They were coming from the mobile home where Johnny and his parents lived.

Q And, do you know who was screaming?

A Yes, it was Johnny screaming.

Q How did you know it was Johnny?

A I could tell it was a little boy. Anybody could tell it was him. It is the only place that the screams could have come from. It was the screams of a child of that age.

Q And, did you hear any words?

A Sometimes I would hear, oh, no, no, no, no. It was just a great crescendo. I can't simulate the scream, it was too horrible, too terrifying.

Q How long did the screams last?

A Hours, and hours and hours.

Q And, did they happen on weekdays, week-ends?

A It didn't happen on week-ends, they didn't happen [1249] when Mr. Penry was there, that I know of, it was only in the afternoon. Seems like it was at the same time every afternoon. It was sort of a ritual.

Q Did you hear the sound of a child being disciplined or something more?

A No, no, they were terrified screams, terrified screams, pleading screams.

Q Did you ever tell anybody about the screams?

A Yes, yes, I did. I told my neighbor across the street, Mrs. Olney, and I begged her to come to my house and listen to them so we could call the child welfare. It was horrible to get the child welfare to do anything in those days, and I figured if it was two people that could tell them about the screams, that they could do something about it.

Q Did Mrs. Olney ever come?

A Yes, finally she did. She finally came over and had coffee with me, and just about that time, the screams started and she said, my God, Billie, what is that, and I said that is what I have been telling you about, she was hurting that baby, just doing something to that child, and the screams went on and on, and Betty said, [1250] lets go over there, Billie, and I said okay. And, I said, I tell you what, she had a new baby, we will tell her that we have come to see the new baby. So, we picked up some cinnamon rolls and went over, and went up to the porch and the screams continued to go on all this time, and Betty wanted me to wait a minute, wanted to listen a little bit. I couldn't stand the screams any longer, we were closer to

it, and the closer you were, the worse it got and I had to knock and I knocked and the screams stopped and everything was quiet. Absolutely quiet, and it stayed that way for a long time, and, then, I knocked again and it stayed quiet for a while longer and then finally she answered the door, and I told her hello, Shirley, we have come to have coffee with you and see the new baby, and we went in, she made coffee, put the cinnamon rolls on the table and we admired the new baby, and then, I said, well, I want to see Little Johnny, too, and she said, no, he is asleep. I said that's alright, just want to look at him. So, I went back in the bedroom, and the baby was laying there, I mean, Little Johnny was the baby, he was just a baby at two, [1251] and he was covered up and was pretending that he was asleep. His eyelids were trembling, and blinking, he was trying so hard to look like he was asleep, but, I just could tell that he wasn't.

Q Let me interrupt for a second. Did you ever see her beat Johnny?

A I beg your pardon?

Q Did you see Shirley beat Johnny at that time?

A Oh, no, no, no.

Q So, you just simply heard the screams?

A I never spoke to her anything about the child, I only heard his screams every afternoon on the weekdays.

Q Did you say anything to Mrs. Penry at that time?

A No, and I was afraid after I had said what I did about pretending, not really asleep, and he is just putting on, and then, I was afraid that she might become angry

with him not putting on a better act or something, and I went on back into the kitchen where the coffee was and I didn't say anymore. The point was that I wanted to, I wanted the screams to stop and if we went over there the screams would stop, she would stop hurting the baby and then, Betty [1252] would be a witness for child welfare.

Q Did you ever call the child welfare people?

A Betty did. I didn't have a telephone.

Q You didn't have a telephone?

A No, I didn't have a telephone. That is one of the reasons that I wanted Betty to come here so she could call.

Q The screams stopped after that time?

A Yes, they did. They did. But, they didn't live there very long after that, they moved.

Q Did you ever see Mrs. Penry after the time that you went to her house?

A Yes.

Q Where?

A But, she wasn't friendly. When I was in my back yard she was in her yard, she would lift her dress on both sides with her hand and dance around the yard singing old lady Johnson, old lady Johnson, and I just ignored her.

BY MRS. LIEB:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Johnson, I believe Mr. Quentin Purvis, who is a Polk County District Attorney Investigator,

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[48:1278] CAROLYN WARD

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q State your full name?

A Carolyn Sue Ward.

Q Are you married, Mrs. Ward?

A Yes.

Q Do you have children?

A Yes.

Q How many?

A Four.

Q Where do you live?

A Dickinson.

Q Dickinson, Texas. Did you at one time, know Johnny Paul Penry?

A Yes.

Q And, his family?

A Yes.

Q How? How old was Johnny when you came to know him?

A About two years old.

Q And, how did you come to know him?

[1279] A I met his mother, and I would go over and visit them all the time.

Q Where were you living then?

A I lived on the corner of Grand and Eleventh Street, in Baycliff.

Q They lived near you?

A Yeah, about a block and a half over, in a trailer house.

Q How long did you remain in the neighborhood of the Penry family?

A Well, about a year. I lived that close, then, I got married and moved on, I guess, about a mile from them.

Q How long is it since you have been in touch with the family?

A I haven't seen – I seen Johnny once when he was fifteen, he was with his Daddy, and before then, I haven't seen him since he was about seven.

Q Have you ever seen – you haven't seen him since he was fifteen?

A No, I haven't.

Q Let me go back to the time that you first saw him, When he was around two years old, did he wear diapers then?

A I believe he would have had, but, he was burnt [1280] real bad and he wasn't wearing no diaper. He was sitting without nothing on the bottom side.

Q Did you see any of the evidence of the burns?

A Yes, I did.

Q If I suggested – you didn't actually see how the burns occurred, did you?

A No. I seen it after he got out of the hospital.

Q Did Shirley Penry tell you how the burns occurred?

A She said that she had him in the kitchen sink giving him a bath, and he supposedly turned the water on, but the burns were down his back side, and it didn't seem logical to me.

Q She told you that she turned on the water?

A She told me that he turned the water on.

Q And, you said that the burns that you saw didn't look like that could have been true?

A No, because they were on his back, not his side or front or whatever.

Q Did you ever see Shirley punish Johnny?

A Yes.

Q What did she do for punishment?

A Whipped him with a belt, slapped him up the side of the head, anything that she could do.

Q Did it seem like normal discipline to you?

A No. Seemed harsh and cruel.

[1281] Q Made him sit on the floor?

A Yes.

Q How long at a time?

A For hours on end. Not no toys to play with, and he couldn't talk, couldn't get up and move around.

Q Did you ever see any affection between Shirley and Johnny Penry? Did she ever show any affection for this child?

A I didn't see none.

Q Now, am I correct, you lost contact with the Penry family long ago?

A Yes.

Q Let me call your attention to the date of April 29, 1986. This is four years ago. Did you on that day, write a letter to a Warden here in Huntsville?

A Yes, Sir.

BY MR. PRICE:

I am going to ask the reporter – Your Honor, we object to this – Counsel obviously knows this is self-serving unless he has got some permissible ground that he can state now, and I object to this.

[1282] BY MR. SMITH:

Well, our planned to ask her to identify it, before I offered it, Your Honor. Just have it marked to make a record.

BY THE COURT:

You can have it marked.

BY MR. SMITH:

I ask the reporter to mark this document.

REPORTER'S NOTE: (WHEREUPON DEFENDANT'S EXHIBIT NUMBER TWELVE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. SMITH:

May I show it to the witness, Your Honor?

BY THE COURT:

Yes, Sir.

Q Is that a copy of the letter that you wrote the Warden?

A Yes, it is in my hand-writing.

BY MR. SMITH:

Your Honor, I offer the document under the Hearsay Exception, which I [1283] relied on, as highly relevant to critical issues at this stage, and has substantial reliability, and I would like to read it to the jury.

BY THE COURT:

Have you seen a copy of it, Mr. Price?

BY MR. PRICE:

Yes, Sir, I have, and I would like for him to state what exception to the Hearsay Rule this particular document comes under.

BY MR. SMITH:

I just stated that grounds, Your Honor, but, I will state it again.

BY THE COURT:

Let me see the exhibit. At this time, it is not admitted. The objection is sustained. Let me look at it.

Proceed with your questioning.

Q Did you view your letter as self-serving, Mrs. Ward, not what you said, but, do you think it is a self-serving letter?

BY MR. WEEKS:

Object to this question, highly [1284] improper, and not proper grounds for questioning.

BY THE COURT:

Restate your question, Counsel.

Q Do you have any children in the world, Mrs. Ward, to lie and say that Shirley Penry abused her child?

A I had no reason to lie.

BY MR. SMITH:

Pass the witness, subject to redirect.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q You were around him from about – how old was he when you were first around him?

A About two years old.

Q It was about '79 the last time that you were around him?

A Yeah, any length of time. I use to baby sit him, him and his two sisters.

Q From two to seven?

A Off and on, yeah.

Q Did you, during that time period, when he was two, three, four years old, did you feel like that he was mentally retarded?

[1285] A He talked good and he listened. I don't know if he could comprehend too good, because you would have to tell him several times, but, I think he was.

Q You think he was mentally retarded, even when he was two or three years old, when you were first around him?

A I think it got worse as he got older.

Q But, you think he was even at two, or do you know?

A I'm not no professional about that.

Q When you first came into contact with him, he had already been burned?

A Yes.

Q And, that is what you testified to?

A He was sitting in his baby bed with no diaper on, just a little shirt, and he was burnt all the way down his little back.

Q On his back?

A On the back side, buttocks.

Q Buttocks, or his back or both?

A From like about here down.

Q From about the shoulder blade down?

A A little below his shoulder blade.

Q You are talking about his back, right?

[1286] A Back side now, right.

Q His back or not?

A Yeah, his back.

Q His back?

A Uh-huh.

Q And, his buttocks?

A Yes.

Q And, then the back of his legs also?

A Yes.

Q You weren't around when that happened?

A No, Sir, I met him after it had happened, and he had done been in the hospital and came out.

Q You indicated on direct examination that she was making him sit in the floor for hours and hours?

A Yes, Sir, sit in the corner, sit in the room by himself.

Q Were you there?

A Yeah.

Q You were there in the house for hours and hours watching her make him do things?

A I would come to visit and see the kids, and see her. She was a nice person at times, and she would make him sit in the floor beside her or you know, because she said he would get into things [1287] and he did get into things, as most kids do, but I didn't see no reason for harsh punishment, you know, just make him sit there for hours on end.

Q And, you sit there for hours and watched him sit there for hours, I take it, is that what you are saying?

A Not really. We would move around, talk and things like that.

Q But, he had to sit?

A He had to sit still, yeah, he couldn't do anything.

Q How long did this go on?

A You mean –

Q How many – did this go on for a period of years, months or what?

A I seen him do it lots of times. Several years, I guess, you would say.

Q What did Mr. Penry say about this?

A He wasn't around at the time that it was going on.

Q Where was he?

A Working. When I first met him he was working for Texaco, and we went to work for, what it was, well, cookbook bread.

Q Did you ever talk to him about it?

[1288] A No. I figured he knew if anybody knew because he was the Daddy in the home.

Q You would think he would know what was going on?

A You would think he would know, yes, he lived with them.

Q I take it that you weren't concerned enough about this conduct to –

A I was fourteen years old when I met him. I didn't know a whole lot about that.

Q That didn't strike you as anything out of the ordinary?

A Yes, it struck me as I wouldn't treat my own dog like that.

Q But, you never said anything to him or anybody else about it?

A What could I say? I mean, a kid talking to an adult, I wasn't – I just wasn't raised to contradict somebody punishing a child, because I was just considered another child in their eyes.

Q Did you ever know her to go off and leave her kids alone?

A I never knew. I never seen them alone, she would come and bring them.

[1289] Q That's all I am asking you ma'am. I don't want – Defense Counsel over here can ask you about repeating about what everybody else told you I just want to know about what you know. Okay?

A I wasn't going to say.

Q Did you ever see her leave those kids alone?

A No.

Q You indicated that she would make him sit for hours at a time?

A Yes.

Q What would you be doing at the house with her for several hours?

A Talking to her, sit around and visit.

Q I take it you liked her well enough to go visit with her?

A I liked her, she was a likeable person at times but, then, when she would get aggrevated, she would take it

out on anything that was available. She never hit me or nothing, or even – I never seen her get mad at me, but, I seen her take it out on her kids.

Q When he was seven years of age, you lost contact what, because did you move or did they move?

A I quit baby-sitting for her.

Q Okay.

[1290] A So, she didn't have no use for me.

Q She didn't have any use for you?

A She didn't have any use for me, couldn't use me.

Q I detect maybe a little hard feelings there about her. What is it?

A It seemed like that is what she wanted me for, you know, if she came around it was to ask me if I would keep the kids, and I was married by then, and I had two babies of my own, and a step-daughter, and I couldn't keep them no more.

Q You just didn't never bother to go back and visit her?

A Oh, I would see her every now and then, and we would talk, but, I never baby-sit no more, so, she didn't come around me that much.

Q When you were over there, you weren't baby-sitting when you were over there?

A No, I just went to visit.

Q For some reason you just decided to quit visiting her?

A Just kind of played out, just like wasn't a whole lot of interest left.

Q Wasn't because you all had any kind of a falling [1291] out or anything?

A No.

Q You consider her a friend when you were going over there and visiting?

A Yes. If I hadn't I wouldn't have went.

Q Okay.

A Except, when I am uncomfortable around somebody, I kind of steer clear of them.

Q You know that she is dead now, don't you?

A Someone told me that.

Q Have you been out there talking with the Penry family today?

A Yes, but, we wasn't discussing Johnny, because they told us not to.

Q You all were just –

A Just talking about old times.

Q Did you know Mr. Penry pretty well back in those days?

A I really didn't know him that good, just say high and stuff like that. He usually went off by himself and done things, you know, unless you asked him, John, how are you, how have you been doing, or whatever, really wasn't very personal.

Q Was he a pretty good fellow?

A Seemed like a real nice person, yeah. He was [1292] hard-working.

Q By talking to the family members, you know that he lives over in Livingston, now?

A Yes.

Q You never did, ever, one time discuss with him any of these problems that you talked about?

A The only time that we discussed anything like that was when Shirley brought the kids to me and would leave them for a week or two on end.

Q My question, ma'am, did you ever talk to him?

A I am fixing to tell you.

Q Just tell me.

A When he came to get the kids, my husband would go get them because he didn't know where they were at, then, we discussed it then.

Q You told Mr. Penry about all of this abuse that was going on?

A Yes.

Q You told him about her sitting him in the floor for hours on end?

A Yes.

Q I thought a minute ago you didn't ever talk to him?

A Well, I didn't talk to him about it when I was [1293] a kid.

Q When did you talk?

A I was an adult by then, I was twenty-one, twenty-two by then.

Q Was Shirley still around?

A No, she had already left.

Q They had separated or something?

A She just left. Well, I guess they were separated, she wasn't there.

Q Who had the kids?

A I had them until he got them and then, I think he took them to one of his sisters to stay.

Q What did he tell you about this abuse?

A I don't think he made much comment on it at all. This has been, what, about twenty-five years ago or better, he come and got them, and I never seen him abuse the kids, he would take them somewhere, where you know, somebody cared for them, fed them and clothed them and stuff.

Q You don't think that he probably knew that this abuse was going on?

A I don't think he knew all of it. He probably knew some about it. I was one of them people that didn't go out and tell family stuff like that.

[1294] Q Were you ever around in the home when him and Shirley both were there with the children?

A Yes.

Q How did she treat the children in front of him?

A She treated them just fine when he was around.

Q You are about the fifth or sixth witness that has come in here and said that out of the family or neighbors, that said, that he didn't know anything about this hardly.

A I figured he knew some of it. He may have not know all of it, but, like I said, he worked, and they were at home by themselves, with their mother.

Q He probably have had to have known some of it?

A I'm sure he knew some of it. He wasn't the type person to go and tell anybody.

Q Nor, evidently, was the type of person that would do anything about it?

A Yes, Sir, seems about like that.

Q Nor, were you the type person that would do anything?

A I guess not.

BY MR. PRICE:

Thank you, pass the witness.

BY THE COURT:

[1295] Mr. Smith, do you have any more questions of this witness?

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

Okay. You can step-down. Do either of you, object to her being excused?

BY MR. PRICE:

No, Sir.

BY THE COURT:

You object to her being excused?

BY MR. SMITH:

I don't object, Your Honor.

BY THE COURT:

You are not to discuss your testimony with any other witness.

Do you have a short witness?

BY MR. SMITH:

No, I have a -

BY MR. PRICE:

Your Honor, I do have another question.

BY THE COURT:

Mr. Smith, you want the exhibit back?

[1296] BY MR. SMITH:

Yes, Sir.

CONTINUED CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Did you notice anything else about the home out of the ordinary, about the way that they – where Johnny Penry's home was at that time, anything out of the ordinary?

A Where it was located or –

Q No, about the home itself, inside the home, anything out of the ordinary about the inside of that home?

A Looked like a normal house to me, except that they had one old junk room on the back of the house that seemed to me where she shoved Johnny off when he was being punished for something.

Q Were you ever in Johnny's room in that house?

A Yeah.

Q Where did he stay in the house, what bedroom?

A The little brown house that they lived in on Tenth Street, it was the last room in the house.

Q Did he share the bedroom with any of the other children or did he have his own bedroom?

A He did when he was little, you know, a baby.

Q And, who did he share the bedroom with?

[1297] A Trudy.

Q When he was older, he had his own bedroom?

A I think so.

Q Did you ever go into his bedroom?

A It was always a mess all the time, only time I seen it.

Q Why was it a mess?

A It wasn't cleaned. It was messy, like somebody just used it for a junk room and threw all of the stuff in it.

Q Cluttered?

A Cluttered.

Q Did you ever straighten it up?

A No.

Q Did you baby sit him at the house?

A No, when I baby sat him he was at my house.

Q How did he act when he was at your house?

A I didn't have no problem with him.

Q Acted like a normal child?

A He acted like a pretty good kid, he didn't get into things. He played with the other kids and I never seen him abuse any of them.

Q I'm sorry?

A I said, I never seen him hit the other kids or be mean to them or smash their toes or anything [1298] like a lot of little kids do.

Q Was Jesse born before you lost contact with the family?

A No, Jesse was born, I guess a couple of years before we started lossing contact.

Q So, the baby was there?

A Yes, I never baby sat him, but, I knew he was there, yeah.

Q Did this Defendant know how to use the bathroom and everything on his own after he got up to four or five years old?

A Oh, yeah.

Q He could go to the bathroom, use the bathroom just like any normal kid?

A Yes, Sir.

Q When he was six or seven years old, there towards the end of the time that you were around him on a regular basis, did he appear to be a fairly normal child to you?

A Yeah, he didn't – he didn't seem – he done nothing on is own, somebody had to tell him what to do, wasn't doing a lot of thinking on anything and I wasn't around him the little time that he went to school in Baycliff, so, I don't know what was happening.

[1299] Q You weren't around him then?

A No, I knew about him doing it, because his mother told me that he went for a little while, they didn't want him at school, so, she didn't send him no more.

Q Your understanding that they had a problem with him at school?

A That is what I heard.

Q But, when he was around you, you didn't have no problem?

A I didn't have no problem with him.

Q You never knew of him taking a sharp object and picking the skin off of the bottom of his brother's feet, when Jesse was a little small child?

A No, Sir, I didn't know nothing about it. That is the first I heard of it.

Q You never knew of him abusing Jesse?

A No, Sir.

Q Or any other children?

A No, Sir.

Q Did you ever know of him using scissors to try to stick other children with them in school, when he was in the first grade?

A No.

BY MR. PRICE:

[1300] I pass the witness.

BY THE COURT:

You have any other questions?

BY MR. SMITH:

No further questions.

BY THE COURT:

Okay. You can step-down, and you can be excused, but, you are not to discuss your testimony with any other witness.

BY MRS. WARD:

By excused, you mean I can go home?

BY THE COURT:

Yes, ma'am. Alright. Ladies and gentlemen of the jury, we will recess for ten minutes. Start back at ten minutes after three. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON A TEN MINUTE RECESS WAS HELD.)

BY MR. SMITH:

My next witness will take the rest of the afternoon, no need to keep Billie Johnson around.

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